

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For The Period
From October 1, 1948
Through December 31, 1948
VOLUME 53

A. A. CARMICHAEL, ATTORNEY GENERAL

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL
OF
ALABAMA

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Volume No. 53

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from October 1, 1948, through December 31, 1948.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report to be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

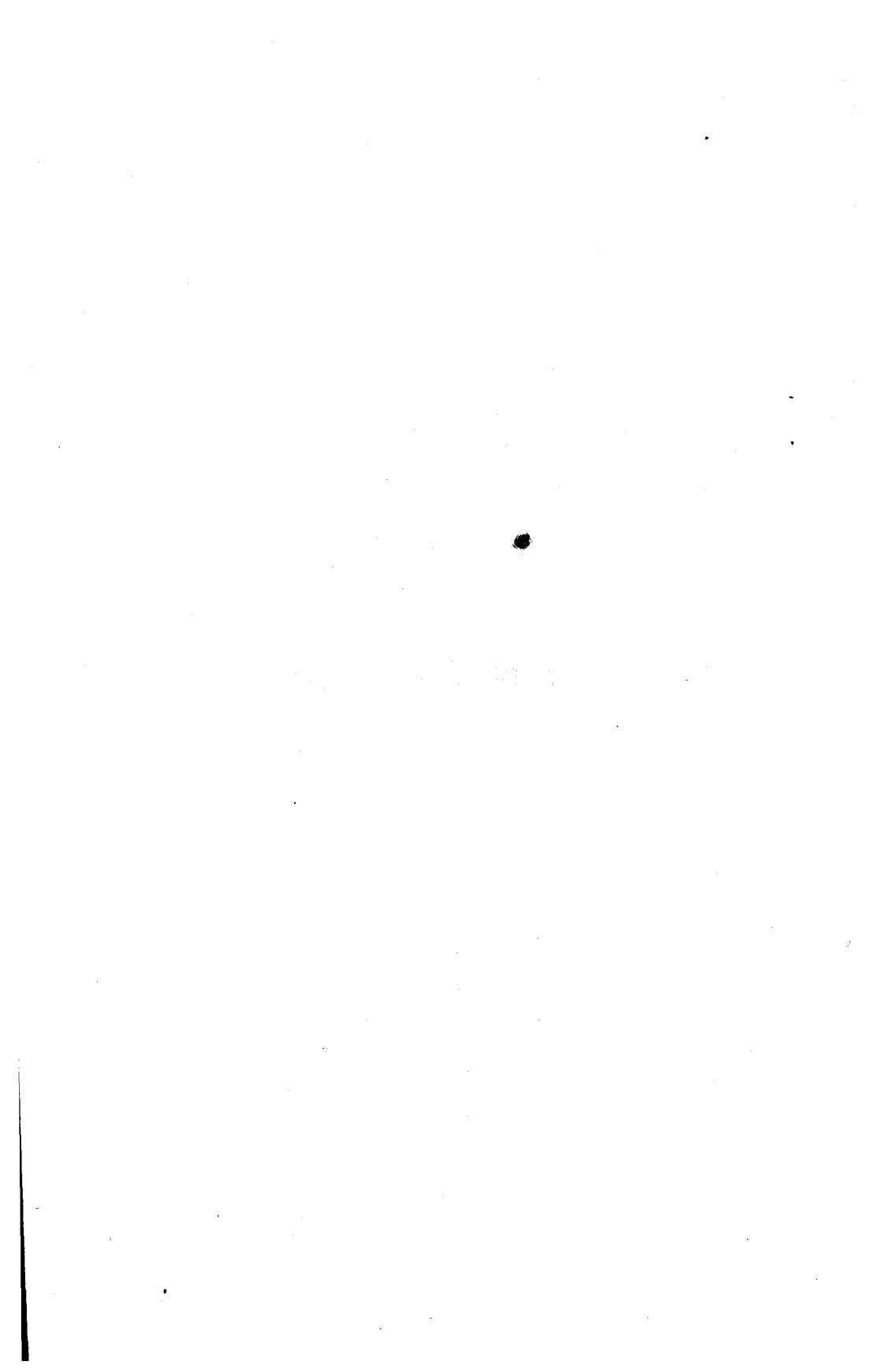
If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,
Attorney General.

OPINIONS



October 4, 1948.

Honorable Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
Montgomery 4, Alabama.

Merit System Act—Governor—Law Enforcement Fund—General Fund—Rewards—Intoxicating Liquor.

1. Inspectors, secret service men, or other persons appointed by Governor under provisions of Title 29, Section 260, Code of Alabama 1940, must be appointed subject to Merit System Act and in the classified service thereof.

2. Employees properly appointed and employed under provisions of Title 29, Section 260, Code of Alabama 1940, must be paid from the law enforcement fund.

3. Rewards offered, fixed, and paid pursuant to Title 29, Section 260, Code of Alabama 1940, may be paid from either the general fund or law enforcement fund.

4. Authority of Governor to assemble and pay temporary emergency police force dependent on existence of facts enumerated in Title 55, Sections 374-378, Code of Alabama 1940.

5. Statute authorizing Governor to appoint certain employees subject to Merit System means classified service, and is controlling over provision of other statute placing all employees of Governor's office not exempted in unclassified service.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of November 19, 1947, is as follows:

"You are respectfully requested to advise me on the following subject:

"Employment status and source of compensation of employees engaged in the enforcement of the intoxicating liquor laws of Alabama.

"It is my understanding that regulations affecting operations, personnel and source of compensation of the Alabama Beverage Control Board are contained within the provisions of Title 29, Sections 1 to 78.

"Title 29, Section 5, provides for appointment of personnel, subject to the merit system and Title 29, Section 71, as amended by General Acts 1943, page 226, provides for compensation and expense.

"It is likewise my understanding that regulations dealing with enforcement of prohibition or intoxicating liquor laws are largely contained within provisions of Section 79 to 261 of Title 29.

"Title 29, Section 246, provides for disposition of receipts from sales of contraband property after all costs are paid, same to be paid into the State Treasury as a 'Law Enforcement Fund,' to enable the Governor to exercise the powers conferred on him by Section 259. Our understanding is that Title 29, Section 246, applies to disposition of contraband liquor in cases which were made by state enforcement officers and not by county officers. The latter being dealt with on this subject under Title 29, Section 227.

"Title 29, Section 251, as amended by General Act No. 126, approved July 17, 1947, provides for disposition of receipts from sales of contraband property, issuing from cases made by either state or county officers. The state's portion being paid into the 'Law Enforcement Fund.'

"Title 29, Sections 259 through 261, authorizes the appointment by the Governor, and subject to the merit system, special types of personnel for detecting and reporting on violations of the prohibition laws.

"This Section 260 further provides that he (the Governor) may offer rewards to Sheriffs, Constables or other persons, for bringing about the conviction of a prohibition law violator. Rewards to be paid out of the State Treasury or the 'Law Enforcement Fund.'

"I have considered provisions of Title 55, Sections 374 to 378, dealing with 'peace and law enforcement officers' and it is my interpretation that provisions of this Act are primarily intended for emergency situations contingent upon local conditions.

"I am informed that payroll bearing date of October 31, 1947, titled 'Law Enforcement Pro. (Prohibition) Fund 804, Miscellaneous Trust Fund' which bears the approval of the Personnel Department with the following endorsement:

"'Employees on this payroll are exempt from provisions of the Merit System Act.' 'Signed C. W. Terry, State Personnel Director.'

"Do the provisions of Title 29, Section 260, preclude payments from the General Fund for ordinary operations, that is, do you interpret this section to imply that only in situations in which there

are insufficient funds in the 'Law Enforcement Fund' may warrants be drawn on the 'General Fund' for payments of rewards and must the ordinary operation expenses of this department be exclusively drawn from the 'Law Enforcement Fund'?

"Can provisions of Title 29, Section 251, have a field of operation separate and apart from Sections 246 and 260 or should Sections 246 and 251 be interpreted as the source of 'Law Enforcement Funds' as used in Section 260, and used subject to provisions of this section?

"Could provisions of Title 55, Sections 374-378 be construed to operate on a continuing basis?

"Is the payroll in question a valid one insofar as the non compliance with the provisions of Title 55, Chapter 9, Personnel Department and Merit System?"

It is my conclusion (1) that the employees referred to in your inquiry should be in the classified service of the Merit System Act, and (2) that said employees should be paid from the law enforcement fund.

At the outset, we should perhaps dispense with a consideration of Title 55, Section 374-378, Code of Alabama 1940. Those sections authorize the chief executive to call together a temporary emergency police force when there is reasonable cause to apprehend a riot, rout, tumult or insurrection. It is sufficient to say that there is no evidence that such a condition exists.

The employees referred to in your inquiry are said to be engaged in the enforcement of the intoxicating liquor laws of Alabama. From the statutes referred to in your inquiry, I must assume that you do not refer to the employees of the Beverage Enforcement Division who are paid from the Alcoholic Beverage Control Stores Funds, Act No. 320, General Acts 1947 (Ms.), approved August 15, 1947 (General Appropriation Act).

The law that authorizes the Governor to "appoint and employ . . . such inspectors or secret service men, or such other persons as he may deem necessary for the purpose of detecting and reporting upon violations of the prohibition laws, . . ." expressly states that he may so "appoint and employ subject to the provisions of the Merit System, . . ." (Emphasis supplied.) Title 29, Section 260, Code of Alabama 1940.

It is true that the Merit System Act (Title 55, Sections 293-327, Code of Alabama 1940, as amended by Act No. 348, General Acts 1943, page 331, and Act No. 349, General Acts 1943, page 332), provides that "all employees of the governor's office not exempted . . ." shall be in the "unclassified" service.

It is my opinion that the requirement contained in Title 29, Section 260, Code of Alabama 1940, that such inspectors, secret service men, etc.,

be appointed and employed by the Governor, subject to the provisions of the Merit System, means that such employees be qualified before appointment; and further, that such employees are subject to the Merit System in all of its aspects. It is my opinion that valid appointments under Title 29, Section 260, Code of Alabama 1940, must be made under the regulations and laws governing the "classified" service.

I do not believe that Title 29, Section 260, Code of Alabama 1940, should be so interpreted as to authorize employment in the "unclassified" service merely because such employees may be "employees of the governor's office." Such an interpretation would nullify the meaning of Section 260, *supra*, because for all practical purposes "unclassified" employees and appointments to such positions are subject to few, if any, of the restrictions or protections of the Merit System Act. Further, it is my opinion that the specific provisions of Title 29, Section 260, Code of Alabama 1940, requiring appointment subject to the Merit System should control over the more general language of Title 55, Section 301, Code of Alabama 1940, as amended, *supra*. I have reference to the fact that Section 260, *supra*, prescribes the manner of appointment and employment of the particular employees in question, while Section 301, as amended, *supra*, in placing certain employees in the "unclassified" service, has reference to a more general description, namely, "all employees of the governor's office not exempted." In this case I believe that the specific provision should govern over the general provision. *Herring v. Griffin*, 211 Ala. 225, 100 So. 202; *Downing v. City of Russellville*, 241 Ala. 494, 3 So. 2d. 34; *State v. Elliott*, 246 Ala. 439, 21 So. 2d. 310.

I also point out that such employees are not employees of the "governor's office" in the sense that their compensation is paid out of appropriations to the Executive Department, the Governor's office, but it will be shown that such employees must be paid from the law enforcement fund or the general fund. See Act No. 320, General Acts 1947 (Ms.), approved August 15, 1947 (General Appropriation Act). Neither are the duties of such employees of the type that can be performed in the Governor's office.

It follows that the payroll referred to in your inquiry required certification as prescribed by Title 55, Section 302, Code of Alabama 1940.

It is also my opinion that the salaries paid to said employees should be paid from the law enforcement fund and not the general fund.

Title 29, Section 260, Code of Alabama 1940, provides that the said inspectors, secret service men, or other persons employed under the provisions of this section, for the purpose of detecting and reporting upon violations of the prohibition laws, are to be paid reasonable compensation "by the state." Section 260, *supra*, does not indicate in so many words exactly from which fund said employees should be paid. Standing alone, Section 260, *supra*, authorizing said employees to be "paid by the

state," would indicate that the salaries should be paid from the general fund. *Weaver v. Tidwell*, 228 Ala. 169, 153 So. 218: But I do not believe that Section 260, supra, can be considered alone.

Section 260, supra, was derived from Act No .7, General Acts 1919, pages 6, 15. Section 260, supra, authorizing compensation to be paid to said employees by the state, was originally part of Section 14 of the Act of 1919. In order to determine what the Legislature meant when it directed that said employees be paid by the State, we may refer to other sections of the same Act.

The Act of 1919, supra, was enacted "to further suppress the evils of intemperance." Among other things, this Act, in Section 12 thereof, establishes a law enforcement fund consisting of the proceeds of property which was used in connection with prohibited liquors. Section 12 of the 1919 Act also provides for the disposition and expenditure of the law enforcement fund so established. By Section 12 of this Act, it is provided that the law enforcement fund may be used by the Governor "to exercise the powers conferred by Section 14 of th Act." As we have already noted, Section 14 of the Act of 1919 included that provision authorizing the Governor to employ secret service men and investigators for the purpose of detecting and reporting upon violations of the prohibition laws.

Section 13 of the Act of 1919, supra, provides that the proceeds from the condemnation of certain vehicles be paid into the law enforcement fund. The subject matter of Sections 12, 13, and 14 of the Act of 1919, supra, is now in the 1940 Code in Title 29, Sections 246, 251, and 260, respectively.

It is my conclusion, therefore, that Section 260, supra, in providing that compensation of said employees shall be paid by the State, means paid by the State out of the law enforcement fund and not the general fund.

As to rewards authorized by Title 29, Section 260, Code of Alabama 1940, it should be stated that such rewards are separate and distinct from other rewards or fees authorized by other statutes. Rewards paid under Title 29, Section 260, Code of Alabama 1940,, must be offered by the Governor, who must set the terms and amount. By this section, the Governor is authorized to select the fund from which said reward shall be paid. He may select either the general fund or the law enforcement fund. See Title 29, Section 260, Code of Alabama 1940.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

October 5, 1948.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
State of Alabama,
CAPITOL.

Department of Finance.

1. The Director of Finance may, with the approval of the Governor, create within the Department of Finance a division known as the Legal Division and staff such division with personnel of legal training and experience, if, in the opinion of the Director, the creation of such division is necessary or convenient to the efficient and expeditious performance of the functions and duties of the department.

2. The duties of such Legal Division must not encroach upon those duties delegated by law to the Attorney General alone, and any opinions rendered by the members of such Legal Division afford no protection to any person acting in accordance therewith, nor may the members thereof represent the State of Alabama in any litigation unless they do so under the control and direction of the Attorney General.

3. The salary of the chief of such division and the salaries of the other employees thereof, as well as the other expenses of the division, are payable from the specific appropriation to the Legal Division of the Department of Finance contained in the General Appropriation Act of 1947.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of July 6, 1948, is as follows:

"It is to be noted that the Finance Department has a Legal Division and is paying from the appropriation made to the Finance Department for the salary of the Chief of the Legal Division.

"Attention is called to Section 244, Title 55, Code of Alabama 1940, which is here quoted:

"244. Litigation affecting state and employment of attorneys under direction and control of attorney general.—All litigation concerning the interest of the state or any department thereof shall be under the direction and control of the attorney general and the employment of any attorneys for the purpose of representing the

state or any department thereof shall be by the attorney general with the approval of the governor, but nothing in this article shall prevent the governor from employing personal counsel, whose compensation shall be payable out of the governor's contingent fund.'

"Attention is called to the fact that the Revenue Department has attorneys employed, however, it is in accordance with Sections 119-124, Title 51, Code of Alabama, 1940, and such attorneys are provided for by an act of the legislature. In such above sections the attorneys so employed are employed as assistant attorney generals.

"Section 70, Title 55, Code of Alabama, 1940, provides that the Director of Finance may, with the approval of the governor create and establish additional divisions in the Department of Finance and assign duties and functions to such divisions. Upon reading the above section it is apparent that such additional divisions may be created, however, it is not understood that additional divisions could be created whose duties are otherwise specifically provided by law, such law apparently prohibiting the employment of such attorneys in the manner as is done by the Finance Department. Also, as has been previously held by your office, that 'It is a well known principle of statutory construction that where there is a general provision of law dealing with a general subject and a special provision of law dealing with a specific subject, the special provision will be construed as an exception to the general law and, therefore, controlling or, stated differently, if there is an apparent conflict between a general provision of law dealing with a general subject and a special provision of law dealing with a specific subject, the general provision will yield to the special, and both will be given effect so as not to conflict. (Atty. Gen. Opinion, dated March 25, 1948, addressed to Dr. D. G. Gill, State Health Officer.)

"Attention is also called to an opinion found in the Quarterly Reports of the Attorney General, July-September 1939, page 276, such opinion dealing with the employment of an attorney for the Department of Agriculture and Industries. It is to be noted that in this instance there was a specific provision of law, namely, Section 31 of the Agriculture Code of 1927 which made provision for the employment of such attorney.

"Attention is also called to Section 228, Title 55, Code of Alabama, 1940, wherein the duties of the Attorney General are set out. Such duties and requirements, among other things, provides that the attorney general 'must give his opinion in writing, or otherwise, on any question of law connected with the interest of the state, or with the duties of any of the departments, when required by the governor - - - director of department of finance, - - - -.' Thus, it appears that it is the duty of the Attorney General, to render the necessary legal services required by the Department of Finance. It also appears that the law contemplated that the services of the

attorney general would be sufficient for the Department of Finance as no provision of law was made for the employment of attorneys for the Department of Finance as was done in other instances for other departments.

"Attention is also called to an opinion found on page 133 of Biennial Report of the Attorney General for the period 1922-1924.

"In the absence of a general law providing for the specific doing of an act whereby certain monies are paid out dependent upon the doing of such act and there is a specific law on the particular doing of the act and thereby limits or set out a definite provision by which such act must be done, would it not be proper to deem that such general law would control just so long as it was not in conflict with or limited by the special provision as set out in a specific law relating to the particular act?

"In view of the above it is respectfully requested that you give me an opinion as to whether or not the Director of Finance can legally create a legal division in the Department of Finance and pay the salary of the chief of such division from the appropriation made to the Finance Department."

In my opinion, your inquiry must be answered in the affirmative.

Provision is made for the creation and establishment of a Department of Finance by Title 55, Section 61, Code of Alabama 1940. The functions, duties and powers of such department are set out in this and succeeding sections, it being provided by Title 55, Section 64, *supra*, that:

"The department of finance shall be headed by and shall be under the direction, supervision and control of an officer who shall be known and designated as the director of finance. The director of finance shall be the chief financial officer of the state and the advisor of the governor and of the legislature in financial matters, and he shall at all times be charged with protecting the financial interests of the state. He shall be responsible to the governor for the administration of the department of finance."

The power and authority of the Director of Finance is stated within Title 55, Section 65, *supra*, it being there provided that:

"All functions and duties of the department of finance shall be exercised by the director of finance, acting by and through such administrative divisions or such officers as he may designate. He shall have all power and authority necessary or convenient to carry out the functions and duties of the department of finance." (Emphasis supplied.)

It is further provided by Title 55, Section 70, *supra*, that:

"With the approval of the governor, the director of finance may create and establish such additional division or divisions as may be determined to be necessary or convenient in the efficient and expeditious performance of the functions and duties of the department of finance and assign functions and duties for such division or divisions, and he may, with the approval of the governor, reassign functions and duties as between existing divisions. Chiefs of such new divisions shall be appointed by the director of finance with the approval of the governor, subject to the provisions of the merit system."

In your request, you inform me that there now exists within the Department of Finance a division known as the Legal Division, and you inquire as to the authority of the Director of Finance to establish such a division within the department, your request apparently being predicated upon the fact that the establishment of such division might in some manner infringe upon the inherent, constitutional or statutory authority and duties of the Attorney General. In my opinion, it does not.

In your request, you correctly cite statutory provisions pertaining to the duties of the Attorney General. Title 55, Section 228, Code of Alabama 1940, provides, in part, with respect to the duties of the Attorney General, that:

"He must give his opinion in writing, or otherwise, on any question of law connected with the interests of the state, or with the duties of any of the departments, when required by the governor, secretary of state, auditor, treasurer, superintendent of education, commissioner of agriculture and industries, director of department of finance, comptroller, state health officer, public service commissioners, director of conservation, or the director of the department of revenue, or any other officer or department of the state when it is made, by law, his duty so to do; and he shall also give his opinion to the chairman of the judiciary committee of either house, when required, upon any matter under the consideration of the committee."

By virtue of Title 55, Section 240, Code of Alabama 1940, as amended by Act No. 275, General Acts 1943, page 238, this duty is extended to cover the rendition of opinions by the Attorney General to county and municipal officials.

It should be further observed that such opinions of the Attorney General, if in writing, afford protection to state, county, or municipal officials acting in accordance therewith, it being provided by Title 55, Section 241, Code of Alabama 1940, that:

"The written opinion of the attorney general secured by either a state or a county officer legally entitled to secure such opinion, shall protect such officer to whom it is directed from liability to either the state, county or other municipal subdivision of the state,

because of any official act or acts performed as directed or advised in such opinion."

Cf. Quarterly Report of Attorney General, Vol. 1, page 276.

You likewise correctly cite Title 55, Section 244, Code of Alabama 1940, as pertaining to the duties of the Attorney General. This statute provides that:

"All litigation concerning the interest of the state or any department thereof shall be under the direction and control of the attorney general and the employment of any attorneys for the purpose of representing the state or any department thereof shall be by the attorney general with the approval of the governor, but nothing in this article shall prevent the governor from employing personal counsel, whose compensation shall be payable out of the governor's contingent fund." (Emphasis supplied.)

Construing all of the above-quoted statutory provisions, it is my opinion that by virtue of Title 55, Section 70, *supra*, the Director of Finance is vested with the authority, with the approval of the Governor, to create within the Department of Finance a division which he may entitle the Legal Division, and staff such division with personnel of legal training and experience, if in the judgment of the Director of Finance the creation of such division is "necessary or convenient in the efficient and expeditious performance of the functions and duties of the department."

I should here point out that the duties that any such Legal Division may perform must not encroach upon those duties by law delegated to the Attorney General alone. As noted above, the Attorney General is charged by law with the duty of furnishing his official opinion to state, county and municipal officials upon proper request for same being made. Any of such officers acting in accordance with such written opinion of the Attorney General are protected from liability to either the state, county or other municipal subdivision of the state because of any official act, or acts, performed as directed or advised in such opinion. It is also to be observed that by virtue of Title 55, Section 244, *supra*, all litigation concerning the interest of the State or any department thereof shall be under the direction and control of the Attorney General.

It is, therefore, my opinion that, although the Director of Finance may lawfully create within the Department of Finance a Legal Division and may staff such Division with employees of legal training and experience, any opinions rendered by such persons to the Director, or to any other person, are not clothed with the validity of opinions of the Attorney General, and offer no protection to those acting pursuant thereto. Neither may such employees institute or appear in a representative capacity in any litigation affecting the interest of the State, or the Department, unless they do so under the control and direction of the Attorney General.

The powers, authority and duties above enumerated are reserved to the Attorney General alone.

This conclusion finds support in the fact that the Legislature of Alabama in the General Appropriation Act, approved August 15, 1947 (Act No. 320, General Acts 1947, page 183), made a specific appropriation of \$9,000 per annum for the expenses of the Legal Division of the Department of Finance. Although not controlling upon the question here considered, this appropriation, to me, indicates legislative sanction of the creation and maintenance of such division.

In your request, you refer to an opinion of this office found reported in Biennial Report of Attorney General, 1922-24, page 133. However, in view of the provisions of Title 55, Section 70, *supra*, which were not then in effect, it is not necessary for me to here consider the same.

Certain duties are imposed by law upon the Department of Finance and the Director thereof; certain others upon the Attorney General and his department. The two departments are separate and distinct arms of the State government. The Attorney General is charged by law with the duty of furnishing the Department of Finance with legal assistance. However, in my opinion, if the Director of Finance, in the conduct of the affairs of such department, finds it "necessary or convenient in the efficient and expeditious performance of the functions and duties of the department" to create within the department a division entitled the "Legal Division" and staff the same with personnel of legal training and experience, Title 55, Section 70, *supra*, vests him with authority so to do.

The salary of the chief of such division, and the salaries of any other employees of the division, as well as the other expenses of the division, are payable from the specific appropriation to the Legal Division of the Department of Finance in the General Appropriation Act of 1947, which you no doubt overlooked since you do not cite or quote the same in your request for opinion. This specific appropriation is made in words and figures as follows:

"Division Legal:

For salaries	\$8,020.00
For other expenses	\$ 980.00
	\$9,000.00"

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 5, 1948.

Hon. Thomas A. Peavey,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Schools—Boards of Revenue—Title 52, Section 207, Code of Alabama 1940.

The Board of Revenue of Escambia County is authorized to appropriate general funds of the county to aid the City of Brewton High School in the purchase of musical instruments for its band under the provisions of Title 52, Section 207, Code of Alabama 1940.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of September 14, 1948, is as follows:

"(1) I and our County Board of Revenue request you to give us a Ruling as early as possible on the following proposition:—

"(2) The Board of Revenue of our County has allowed the City of Brewton High School the sum of (\$804.00) Eight Hundred and Four Dollars to purchase musical instruments for the City of Brewton High School Band subject to your ruling.

"(3) You have heretofore ruled that such appropriation may be made for Musical Instruments for the Band of County High Schools.

"(4) Title 12, Section 12 of the Code of 1940, at the end authorizes appropriations for County Schools; Title 52, Section 207 of said Code authorizes the County to appropriate funds for the support of the 'Public Schools' within the County.

"We do not find any express Statute authorizing the County to appropriate money for Musical Organizations or Brass Bands of the City High Schools and we do not know what the meaning of 'Public Schools' is and do not know whether it includes City Schools.

"(5) Please let us have your ruling at an early day and as soon as possible."

It is my opinion that the Board of Revenue of Escambia County, Alabama can appropriate funds from the general fund of the county for the purchase of musical instruments for the City of Brewton High School band.

Title 52, Section 207, Code of Alabama 1940, reads as follows:

"The courts of county commissioners or boards of revenue of the several counties of Alabama are authorized at any meeting of said court in any calendar year to appropriate any funds they may deem proper and expedient out of the general funds of the county treasury for the support of the public schools within said county."

This office, in an opinion to Hon. Frank O. Deese, Judge of Probate, Dale County, under date of May 12, 1948, held that authority was contained in the above statute for the county board of revenue to purchase musical instruments for the band of a county high school.

As pointed out in your request for an opinion, the school under consideration is a city school. The scope of the statute, *supra*, is therefore here considered in its application to a city high school as distinguished from a county high school.

The wording of the statute reads in effect that the county board of revenue of each county may appropriate, in their discretion, funds for the support of the "public schools within said county." "Public schools" have been defined as those schools comprising the free school system which has been generally adopted in the United States; those schools established under the laws of the State and maintained at public expense. 56 Corpus Juris, "Schools and School Districts," Section 2; 35 Words and Phrases, (Per. Ed.), "Public School," 332; 24 R. C. L. 557; Ballentine's Law Dictionary with Pronunciations, "Public School," page 1048; Black's Law Dictionary, (De Luxe Ed.), "Schools," 1585.

Since a city high school, such as the City of Brewton High School, would classify as a public school, and since such a school is located in Escambia County, it is my opinion that the phraseology "public schools within said county" contained in the statute, *supra*, is complied with.

You are therefore advised that it is my opinion that the Board of Revenue of Escambia County may appropriate the sum of \$804.00 to aid the City of Brewton High School in the purchase of musical instruments for its band.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

October 7, 1948.

Honorable W. D. Partlow,
Superintendent,
The Alabama State Hospitals,
Tuscaloosa County,
Tuscaloosa, Alabama.

Insane Hospitals—Health—Drug Addicts.

Title 22, Sections 249 and 250, Code of Alabama 1940, do not authorize a court of competent jurisdiction to commit a patient to the Alabama Insane Hospitals for drug addiction hospitalization.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of September 24, 1948, is as follows:

"Will you kindly give me an opinion on the following question?

"Do Sections 249 and 250 of Title 22 of the Code of Alabama of 1940 authorize a court of jurisdiction to commit a patient to The Bryce Hospital for drug addiction?

"It has been my understanding that the purpose of these Sections is to authorize such court commitment either to a private institution of the patient's choice or to a Federal supported institution for the treatment of drug addiction and not to the State insane hospitals, supported by the State of Alabama.

"It seems that Sections 189, 203, 204, 208 and 209 of Title 45, Code of Alabama 1940, would limit definitely the functions of the State hospitals to the care and treatment of the insane and would limit a court of jurisdiction in commitment to these institutions to the insane and none others.

"We are holding the patient in the institution under authority limited in Sections 249 and 250 of Title 22, Code of Alabama 1940, a copy of which commitment is attached hereto, which we question the authority for detaining such individual in this institution. You will note the authority and the commitment specifies drug addiction and at no point refers to the individual being insane."

I am of the opinion that your inquiry should be answered in the negative.

Title 22, Section 249, Code of Alabama 1940, provides for the notice of hearing to a drug addict sought to be hospitalized. Section 250 of said

Title deals with the hearing and commitment. Said Section 250 provides as follows:

"Hearing and commitment of drug addict.—At the time and place specified in the notice, the person assumed or described in such notice, or his counsel, being present, the judge shall hear the evidence presented and shall appoint a commission of two physicians who shall examine such person and certify to the court as to whether such person is a habitual user of habit forming drugs as contemplated in the preceding section. Upon being satisfied that all allegations contained in the affidavit are true, the judge shall make and file an order requiring the person named or described to forthwith take and continue treatment for the cure of drug addiction at a private institution under medical supervision to be selected by the person committed, and approved by the state board of health, if such person is able to pay therefor, otherwise at some hospital or institution under medical supervision owned by the United States and at the expense of the United States which maintains such institution. In the event the judge is not satisfied from the evidence adduced that the person is an habitual user of habit forming drugs as contemplated in the preceding section, he may order the commitment of such person for observation for a period not exceeding thirty days and upon expiration of that time shall consider the testimony of the superintendent or physician in charge together with the evidence theretofore presented in rendering decision on the commitment of such person. The order of commitment shall require reports to be made to the court and to the state board of health at stated intervals therein specified by the physician or superintendent in charge, as to the effect and progress of the treatment. A copy of the order forthwith shall be served upon said person. The care and treatment of persons committed under this section shall be designed to rehabilitate them and restore them to mental and physical health; under regulations prescribed by the state board of health or the United States, the physician or superintendent in charge of the institution may parole inmates but such persons shall be finally discharged from further treatment and supervision only by the committing magistrate or his successor and only upon the recommendation of the superintendent or physician in charge of the institution to which committed. Any trial court having jurisdiction of a defendant in a criminal action or proceedings, if it appears that the defendant habitually uses narcotic drugs as contemplated in the preceding section, may in its discretion likewise commit such person for treatment and rehabilitation to a public hospital or institution under medical supervision designated by the state board of health. In any such case the court may in its discretion stay further criminal proceedings or defer the imposition of sentence pending the discharge of the patient from treatment in accordance with the procedure outlined in this section. Upon the recommendation of a duly licensed practicing physician or public health official that a person habitually uses narcotic drugs as contemplated in the preceding section, a judge or magistrate of a city, county, or state court, may commit to a

public institution under medical supervision and duly approved by the state board of health a person making voluntary application for treatment for drug addiction. A person so committed shall not be detained under such voluntary agreement more than ten days from and inclusive of the date of notice in writing of his intention or desire to leave such hospital or institution. Any person who shall fail, refuse, or neglect to comply with the terms and conditions of any order of a court duly issued and served in accordance with this section shall be deemed in contempt of court and shall be proceeded against accordingly."

A commitment under the first portion of this section, in my opinion, must be either to a private institution of the patient's choice, approved by the State Board of Health, or to a Federal supported institution.

The emphasized portion of the above quoted section authorizes commitment to a public hospital or institution designated by the State Board of Health in cases of a defendant in a criminal prosecution. It was evidently under this proviso that the court order in question was issued as the patient under consideration is a defendant in a criminal prosecution. However, I am informed by the State Health Officer that there has been no designation of the Alabama Insane Hospitals (including The Bryce Hospital at Tuscaloosa, Alabama) as the place of commitment of drug addicts in general or the patient under consideration in particular. Therefore, there is no authority for the commitment of this patient to The Bryce Hospital as the designation by the State Board of Health is a condition precedent to an authorized place of commitment.

There can be no commitment of narcotic addicts except in strict compliance with the statutory provisions above noted.—Cf. Quarterly Report of Attorney General, Vol. 31, page 70.

Moreover, it may be noted that under the provisions of Title 45, Chapter 5(Sections 189-230), Code of Alabama 1940, titled "Insane Hospitals," it is contemplated that the State Hospitals be utilized as the place of commitment of only those persons committed as insane by proper court order.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 7, 1948.

Hon. John Graves,
State Comptroller,
Department of Finance,
CAPITOL.

Poll Tax—Department of Finance—Act No. 320, General Acts 1947, page 183—Constitution of Alabama 1901, Section 259.

The Department of Finance can properly charge the cost of printing poll tax receipts to the Poll Tax Fund as a collection expense.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of August 26, 1948, is as follows:

"Section 239, Title 51, 1940 Code of Alabama, provides that it is the duty of the Department of Finance to prepare forms for poll tax receipts with the approval of the Governor and this office has, for several years, designed the forms to be used for this purpose. Under the prior lump sum appropriation to the Finance Department by the Legislature, the financing of these supplies has not been a problem.

"The 1947 Legislature, under Act No. 320, places close cost scrutiny and stricter budgetary provisions on the Department of Finance by appropriating to each Division of the Department a fixed amount for salaries and expenses and under such an appropriation breakdown as that provided for the various divisions of the Department of Finance an expenditure for poll tax receipts out of any Division in the Department of Finance would result in an appropriation wrongfully expended and a violation of Section 106, Title 55.

"Please furnish us with your official opinion covering the following question:

"1. Can the cost of printing poll tax receipts be properly charged as a collection expense against the Poll Tax Fund?"
My answer is in the affirmative.

Title 51, Section 239, Code of Alabama 1940, is quoted as follows:

"Section 239. Poll Tax receipts.—The department of finance with the approval of the governor, shall prepare and have printed suitable forms of poll tax receipts, with appropriate blanks for name, color, sex, address, precinct, or ward, and year for which paid and date of payment. Before the first day of October of each year he shall furnish to the several tax collectors a supply of blank receipts, countersigned by him, sufficient for the probable wants of the several counties, taking the tax collector's receipt for same. Each blank receipt for such poll tax shall have a duplicate attached thereto, on which shall be printed such matter as the director of finance may prescribe, the number of such receipt and appropriate blank spaces to be filled in by the tax collector, showing by whom paid, and when and for what year, and the director of finance shall take and file in his office a proper receipt from the tax collector for the poll tax receipts so furnished him." (Emphasis supplied.)

I construe the above code section as placing a mandatory duty upon the Department of Finance to prepare and have printed suitable poll tax receipts.

As stated in your request for an opinion, the 1947 Legislature, in the general appropriation bill (Act No. 320, General Acts 1947, page 183), does not provide for a specific appropriation covering the expense of printing said poll tax receipts. In addition, the appropriation by the 1947 Legislature to the Department of Finance was on a divisional breakdown basis with a budget outlined for each division. An expenditure by any division of the Department of Finance that is not in accordance with this budget would contravene Title 55, Section 106, Code of Alabama 1940, which section makes it unlawful to expend any appropriation for any purpose other than that outlined in the budget.

In addition, Constitution of Alabama 1901, Section 259, reads as follows:

"All poll taxes collected in this State shall be applied to the support of the public schools in the respective counties where collected."

From the above it can also be seen that Section 259 of the Constitution earmarks all proceeds from the collection of poll tax to the support of the public schools.

However, in an interpretation of Section 259, *supra*, the Supreme Court of Alabama, in the case of *Shaver v. Robinson*, 59 Ala. 195, held in effect that the expenses of collecting poll taxes can first be made against the Poll Tax Fund before a distribution of the proceeds is made.

Headnote No. 1 of this case is quoted as follows:

"1. The poll-tax must bear the expense of its assessment and collection.—Although the Constitution requires that the money derived from the poll-tax shall be applied exclusively 'in aid of the public school fund,' it must bear the expense of its own assessment and collection."

In the body of the opinion, the Supreme Court states as follows:

"We think it clear that through all our changing legislation, the expense of assessing and collecting the poll-tax has been made a charge on the fund itself."

The *Shaver Case*, *supra*, is conceded to be an old decision, but legal research discloses that it has not been overturned throughout the years, and since the Constitutional section to which it was directed (Constitution of 1875, Art. XIII, Section 4, is substantially the same as Section 259, Constitution of Alabama 1901, *supra*, in considerations here pertinent, it must be considered as the last expression of our Supreme Court on the subject. It is therefore my opinion that the cost of printing poll tax

receipts can be properly charged as a collection expense against the Poll Tax Fund, and your question is answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 14, 1948.

Hon. J. C. McGough,
Judge of Probate,
Fayette County,
Fayette, Alabama.

Court of County Commissioners—Veterinarians—Health and
Health Department—Counties—Salaries.

1. A county has no authority to pay the salary of a county veterinarian to enforce the health and quarantine laws except pursuant to request of the State Board of Health.

2. A county is authorized to pay the salary of an individual directly to him when he is appointed pursuant to a request from the State Board of Health to enforce the health and quarantine laws of the State.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of March 16, 1948, is as follows:

"Sometime during the late Summer of 1943, Fayette County and its people were in need of a good Veterinarian to look after the care and protection of its livestock interest, and Dr. C. E. Deal was induced to come from Tuscaloosa County and locate in Fayette County, and Fayette County agreed to pay him a salary of \$50.00 per month to supplement his income as Veterinarian. This monthly payment has been made to Dr. Deal each month since that date up to and including the month of January, 1948, at which time payment was discontinued due to the fact that the State Examiners of Accounts have raised a question as to its legality. These monthly payments have been made direct to Dr. Deal each month as County Veterinarian, and the State Examiners have been unable to find any authority of law for the employment of any one as County Veterinarian, but calls attention to Ruling of the Attorney General under date of May 11, 1943, found on page 34, Vol. 31, Quarterly Report for period: 4/1/43-6/30/43, advising that Title 12, Section 12, subsection 19, Code of 1940, the County was authorized to appropriate funds for the payment of a meat inspector when requested so to do

by the State Board of Health. I do not recall now if there was any request made by the State Board of Health for the employment of Dr. Deal, and am quite sure there was no such request.

"Dr. Deal is now engaged in inspecting meats sold by individuals and the quickfreeze plant in Fayette, and his compensation is paid by the parties to whom he renders such services. He states that Fayette County guaranteed the payment of \$50.00 per month for two years, and that it would continue to pay this amount so long as conditions warranted such payments. The County has continued to make the monthly payments, as above stated, until the State Examiners raised the question of legality. Therefore, you are requested to give me your official opinion on the following questions:

"1. Did Fayette County have the authority to employ a County Veterinarian and pay him a salary out of its General Fund in the absence of any such request from the State Board of Health?

"2. Does Fayette County have the authority to employ a County Veterinarian and pay him a salary out of its General Fund, if requested to do so by the State Board of Health?

"3. May such payments be made direct or must such payments be appropriated and paid to either the State Board of Health or the County Board of Health?"

In answer to your questions, reference is made to Title 12, Section 12, Subsection 19, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, approved July 6, 1945, which defines the authority of a court of county commissioners as follows:

"To appropriate money to promote or enforce the health and quarantine laws of the state for the benefit of the county and its inhabitants, when requested so to do by the state board of health."

In answer to your first question, it is my opinion that Fayette County is without authority to pay the salary of a county veterinarian unless such is done in compliance with the above quoted provision. Quarterly Report of Attorney General, Vol. 31, page 34. It has been constantly held by the courts of Alabama that the courts of county commissioners, or other like administrative agencies, are creatures of the legislature and, before they can perform any act or appropriate public funds, there must be a provision of law expressly or impliedly granting the authority for such act or appropriation.

In answer to your second question, by virtue of Subsection 19, supra, it is my opinion that Fayette County is authorized to appropriate funds for the payment of an individual "to promote or enforce the health and quarantine laws of the state" when requested to do so by the State Board of Health. The test of legality to be applied in such a case is: (1) Has there been a request from the State Board of Health? and (2) Is

the appropriation to promote or enforce the health and quarantine laws of the State for the benefit of the county and its inhabitants?

The employment of a county veterinarian as such is not authorized by statute; but, the employment of an individual (regardless of his title) in accord with tests (1) and (2), *supra*, is permissible. Quarterly Report of Attorney General, Vol. 31, page 34.

In answer to your third question, in my opinion, such payments may be made directly to the individual, provided the conditions set forth in Subsection 19, *supra*, have been met.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 18, 1948.

Hon. C. J. Coley,
Probate Judge,
Tallapoosa County,
Dadeville, Alabama.

Taxation—Licenses—Pool Tables.

Pool tables owned or operated by private clubs are liable for license as required by Title 51, Section 575, Code of Alabama 1940, when a charge is made for playing thereon.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of August 23, 1948, is as follows:

"A representative of the State Department of Revenue has filed in the Probate Judge's Office of Tallapoosa County a citation dated July 15, 1948, directed to 'Bevelle Club House,' Avondale Mills, Alexander City, Alabama, for failure to procure the license for 6 pool tables, provided for in Title 51, Section 575, Alabama Code of 1940.

"The facts given to me in regard to the operation of these pool tables are as follows: The Avondale Mills Company own considerable acreage in Tallapoosa County on which their textile plant and employees resident are located; also there is a building located on the above property known as the Bevelle Community Club House. The Club House was built and is owned by the Avondale Mills Company. This Club House, including recreation facilities, is used by employees of the Avondale Mills Company at Alexander City, Alabama.

In this recreation hall there are six pool tables that are owned by the Avondale Mills Company but are furnished the company's employees for recreation free of any charge by the Avondale Mills Company. A charge of ten cents is assessed by the club members for each game of pool played. This charge is made to cover maintenance and operating expenses of the pool tables. All receipts in excess of maintenance and operating expenses are paid out for community welfare; namely Bevelle Employees Federal Credit Union; Bevelle School; Bevelle Methodist and Baptist Churches; Bevelle Scout Troop; Bevelle Community Band; Community Basketball, Baseball and Football teams.

"The question now is, are these pool tables subject to the license tax set out in Title 51, Section 575, Code of 1940, or are they exempt from license levied by the foregoing schedule due to the fact that the operation is carried on as a social club.

"It is requested that you render an official opinion on the foregoing set out facts, as to the liability for a privilege license for these pool tables."

Your attention is invited to Title 51, Section 575, Code of Alabama 1940, which reads as follows:

"Sec. 575. Pool tables.—Each pool table upon which the game of pin pool, bottle pool or starboard pool, or other like device is played, one hundred dollars. For each table upon which the game of pool or billiards is played with fifteen balls or more or less, and not pin-pool, twenty-five dollars. Provided that the provisions of this section shall not apply to pool or billiard tables operated or owned by private individuals and used in their homes, or pool or billiard tables operated or owned by private clubs, social clubs, or Y. M. C. A.'s when no charge is made for playing thereon." (Emphasis added.)

You will note that the above quoted statutory provision expressly exempts pool tables owned or operated by social clubs and private clubs only when no charge is made for playing thereon. As stated in your request, a charge of 10¢ is assessed against a club member for each game of pool played upon the pool tables owned and operated by the Bevelle Community Club House. Therefore, in view of this fact, I am constrained to hold that the Bevelle Community Club is liable for the payment of a privilege license on its pool tables which are operated as described in your request.

The courts have long held that statutes creating an exemption from taxation must be strictly construed. *Brown v. Protective Life Ins. Co.*, 188 Ala. 166, 66 So. 47.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 18, 1948.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
CAPITOL.

Taxation—Counties.

The imposition of the Tennessee Sales Tax upon sales of merchandise shipped via common carrier or through the United States mail in interstate commerce from Tennessee to county governing bodies, county boards of education and other political subdivisions of the State of Alabama is prohibited by the Commerce Clause of our Federal Constitution.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of January 16, 1948, is as follows:

"The State of Tennessee has a sales tax.

"Merchants and manufacturers of Tennessee ship in interstate commerce, merchandise to customers in Alabama.

"Purchase of merchandise is made either from consignors agent traveling in Alabama or by mail from consignee in Alabama.

"We have been advised that State departments and subdivisions of State are being invoiced for sales tax under conditions described above.

"Your official opinion as to the legality of the payment of this tax by the following subdivisions is requested.

"1. Department of Corrections and Institutions.

"2. County governing bodies.

"3. County Boards of Education."

You further advise this office that the purchases of merchandise by the various State agencies as listed in your request were made as follows: (1) By mail from vendors located in Tennessee, and (2) By orders placed in Alabama with agents of vendors located in Tennessee, and these orders are for merchandise manufactured or stored in Tennessee which is subsequently delivered to a common carrier in Tennessee for shipment to Alabama.

I am of the opinion that the imposition of the Tennessee Sales Tax upon the transactions as described in your request is prohibited by the Commerce Clause of our Federal Constitution, which reads as follows:

"Article 1, Section 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises, shall be uniform throughout the United States; * * * * * To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."

I invite your attention to the holding of the United States Supreme Court in the case of **Adams Manufacturing Company v. Storen**, 304 U. S. 307, 82 L. Ed. 1365, which reads as follows:

"We conclude that the tax is what it purports to be,—a tax upon gross receipts from commerce. Appellant's sales to customers in other states and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent on every dollar received from these sales.

"The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article 1, Section 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and non-discriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."

Also, in the case of **Dahnke-Walker Milling Company v. Bondurant**, 257 U. S. 282, 66 L. Ed. 240, the United States Supreme Court held that where goods are purchased in one state for transportation to another, the purchase is interstate commerce, quite as much as in the transportation.

Thus, in view of the Commerce Clause of the Federal Constitution which expressly commits to Congress, and impliedly withholds from the several states, the power to regulate commerce among the states and the above cited holding of the United States Supreme Court, I am of the conclusion that the imposition of the Tennessee Sales Tax upon the transactions as described herein is prohibited by the Federal Constitution. Therefore, it is an illegal charge, and the various agencies of the State

of Alabama as mentioned in your request are not authorized to expend funds in payment of such charges.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 18, 1948.

Hon. Henry W. Sweet, Director,
Department of State Docks and Terminals,
Mobile 4, Alabama.

Merit System—Docks Commission—Labor.

The Department of State Docks and Terminals may institute a vacation plan for its hourly paid employees, provided the plan is approved by the Alabama State Personnel Board and the Governor.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of September 16, 1948, is as follows:

"The Department of State Docks and Terminals proposes to adopt a vacation plan for hourly paid personnel, subject to the approval of the Governor and the Alabama State Personnel Board. A copy of the proposed vacation plan is hereto attached and made a part hereof.

"In connection therewith, your official opinion is requested on the following matters:

"1. Does the Director of the Department of State Docks and Terminals have authority to adopt and implement a vacation plan for hourly paid personnel of the Department pursuant to the attached plan, subject to the approval of the Governor and the Alabama State Personnel Board?

"2. Does the Director have authority to pay vacation pay to the qualified hourly employees of the Department for the vacation period, at the pay rate authorized at the time of vacation?

"3. Does the Director have authority to pay vacation pay to the proper legal representative of an hourly employee who qualifies for a vacation but who is prevented by death from having the same?

"4. Does the Director have authority to pay vacation pay to an employee after termination of employment, who resigns after proper notice, and who is otherwise in all respects eligible for vacation?

"5. In the event of adoption of a vacation plan for hourly employees may the same be revoked by the Director, subject to the approval of the Governor and the Alabama State Personnel Board, at any time without further obligation to the employees of the Department?"

I have carefully examined the "Alabama State Docks and Terminals Proposed Vacation Plan for Hourly Paid Personnel" and find it in accord with the law. The proposed vacation plan reads as follows:

**"ALABAMA STATE DOCKS AND TERMINALS PROPOSED
VACATION PLAN FOR HOURLY PAID PERSONNEL**

"The following regulation shall govern the vacation plan for hourly rated employees of the Alabama State Docks and Terminals.
"EMPLOYEES ELIGIBLE FOR VACATION

"An employee shall be entitled to a vacation with pay if at any time while he is working between January 1st and December 31st, inclusive he has

"(a) completed 1 or more years of continuous service and has

"(b) worked 1200 or more hours in the immediately preceding 365 days.

"For the purpose of determining whether 1200 or more hours have been worked, time lost during such 365 days due to an injury arising out of Alabama State Docks and Terminals employment or due to a leave of absence due to jury duty shall be added to the actual hours the employees worked, at the rate of 8 hours per day but no more than 40 hours per week.

"If an employee is absent from duty for a period of over 21 days without assignment of reason therefor and approved by the Director such employee will be considered to have broken his continuous record of service insofar as this vacation plan is concerned.

"Leave of absence may be granted by the Director when adequate reason is assigned for such request without breaking continuous service record of the employee.

"Sickness for period of over 7 days must be supported by Doctor's certificate.

"An employee who resigns or quits without giving a notice of at least 7 days or is dismissed or discharged loses all vacation rights, provided however, that an employee who resigns after proper notice, who is in all respects eligible for vacation, will not lose or forfeit such vacation rights.

"LENGTH OF VACATION

"The eligible employee with 1 or more years continuous service shall be entitled to a vacation of one week with pay. The vacation taken shall consist of consecutive days.

"VACATION PERIOD

"The vacation period shall be from January 1st to December 31st, inclusive. All vacations must be completed by December 31st.

"APPLICATION OF VACATION

"Time lost by an employee for a period of at least a payroll week due to bona fide sickness or injury, due to leave of absence, or due to lay-off, may also be applied to any vacation time to which such employee is entitled if the employee so requests.

"It is the intent and purpose of the vacation plan that all eligible employees shall receive the benefit of vacation from work. However, pay in lieu of vacation will not be made during a time that the employee is working.

"The employee shall take his vacation as scheduled by the Director provided he has not had time lost as described applied to all vacation time to which he is then entitled.

"The employees' wishes as to time off and the time his vacation is to be scheduled will be given consideration but such schedule will necessarily be governed by the operating requirements within the exclusive discretion of the Director.

"After an employee has completed one year of continuous service, vacation may be granted, by the Director, prior to anniversary date of employment, if same is necessary in order to properly schedule vacation and insure adequate operating personnel.

"VACATION PAY

"The vacation pay for a vacation of one week shall be on the basis of 40 hours at the pay rate authorized at the time of vacation.

"The vacation pay will be paid as follows:

- "(a) Vacation pay will be paid on the regular pay day for the period of employee's vacation whether the vacation was taken as scheduled; or applied because of time lost as described under 'Application of Vacation.'
- "(b) In the event of death of an employee who was eligible for a vacation but did not use his vacation, the amount of vacation pay to which he would have been entitled shall be paid to his proper legal representative.

"DURATION OF PLAN

"This vacation plan is effective only on the approval of the Governor and Alabama State Merit Board and is subject to revocation on recommendation of the Director to the Governor and Alabama State Merit Board subject to their approval."

Your attention is called to Title 38, Section 8, Code of Alabama 1940, which is as follows:

"Employees, compensation and selection.—All employees and officers of the department of state docks and terminals (including the chiefs of divisions but not including the director of the department of state docks and terminals) shall be subject to the provisions of law with respect to the method of selection, classification, and compensation of state employees on a basis of merit."

In the light of Section 8, *supra*, in my opinion, this plan is a matter that comes within the jurisdiction of the State Personnel Department and is governed by the rules and amendments thereto of the State Personnel Board. Title 55, Section 300, Code of Alabama 1940, provides as follows:

"Rules of department.—The director shall recommend such rules as he may consider necessary, appropriate, or desirable to carry out the provisions of this chapter, and may from time to time recommend amendments thereto. When such rules or amendments are recommended by the director, the board shall hold a public hearing thereon, and shall have power to approve or reject the recommendations of the director wholly or in part or to modify them and approve them as so modified. Rules or amendments thereto which are approved by the board, or on which the board takes no action within thirty days after they are recommended by the director, shall be submitted to the governor by the director, who shall have power to approve or reject them. Such rules or amendments thereto shall become effective when approved by the governor, or on the tenth day after they are submitted to him if prior thereto he shall not have rejected them. Rules adopted under this section, not in conflict with the laws of Alabama, shall have the force and effect of law. Among other things, such rules shall provide for the method

of administering the classification plan and the pay plan; the establishment, maintenance, consolidation, and cancellation of lists; the application of service ratings; the hours of work, attendance regulation, and leaves of absence for employees in the state service; and the order and manner in which lay-offs shall be effected. Such rules may include any provisions relating to state employment, not inconsistent with the laws of the state, which may be necessary or appropriate to give effect to the provisions and purposes of this chapter. The powers herein conferred upon the director shall be subject only to the provisions of this chapter and of the rules adopted hereunder, and may be exercised by regulation or by order as the director sees fit."

By Section 300, *supra*, the granting of "leaves of absence" or vacations become a matter of policy for the decision of the State Personnel Board. Your proposed plan would become effective upon approval by the State Personnel Board and the Governor.

For the answers to your questions numbered 1, 2 and 4, your attention is called to Rule XI, Section 2(a), of the revised Rules of the State Personnel Board, 1947, which pertains to vacations. Section 2(a), *supra*, reads, in pertinent part, as follows:

"Leaves of Absence

"Annual Leave: Each permanent employee, shall be entitled to annual leave, with pay, in the amount of one working day for each calendar month of service. Accumulation of annual leave may be allowed up to a maximum of 24 working days.

"Employees may utilize their allowances of annual leave on the basis of application therefor, approved by their respective appointing authorities, at such time as they prefer, subject always to the right of the appointing authorities to plan the work under their control and to authorize absences only at such times as the employee can best be spared.

"Unaccrued annual leave may be advanced only with the express understanding that, if such leave is not later earned during the calendar year, deductions will be made for the unearned portion from any salary due the employee, or refunded to the State by the employee. Such unaccrued leave shall not, in any case, exceed that which will have accrued by the end of the year; provided that no advancements of unaccrued annual leave shall be made after January 1, 1949.

"Persons who resign in good standing may be paid for the actual number of working days already accrued, but not for Sundays, holidays, or other non-work days coming after actual separation from the job.

"Persons must have been in the State service a minimum of three months immediately preceding any advance of leave.

"Provisional and temporary employees shall be entitled to one day of annual leave and one day of sick leave for each calendar month of service, provided that they shall not be advanced any leave. This provision becomes effective January 1, 1948, and is not retroactive.

"An employee who maintains a full reserve of sixty days accumulated sick leave for a period of twelve months will have an additional three days added to his accumulation of annual leave."

Your third question is answered in an opinion of this office to Hon. T. C. Garner, Treasurer, Jefferson County, Birmingham, Alabama, dated July 26, 1944, appearing in Quarterly Report of Attorney General, Vol. 36, page 21, where in a similar situation, it was held that the personal representative of a deceased employee subject to the Jefferson County Civil Service Act is entitled to receive payment for accumulated vacation earned by such deceased employee.

Your proposed plan may be revised or revoked at any time with the approval of the Alabama State Personnel Board and the Governor subject only to the unused vacations accrued before revision or revocation. Section 300, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 18, 1948.

Hon. Emmett Perry,
Solicitor, Tenth Judicial Circuit,
Birmingham 3, Alabama.

Jefferson County—Juvenile Courts—Schools—Infants.

1. The Juvenile and Domestic Relations Court of Jefferson County has original and exclusive jurisdiction over prosecutions against parents or guardians for violations of Title 52, Section 102, Code of Alabama 1940, requiring parents to send children to school.

2. Only children between the ages of seven and sixteen are required by law to attend school. Title 52, Section 297, Code of Alabama 1940.

3. The Juvenile and Domestic Relations Court of Jefferson County may or may not have jurisdiction over a married male under the age of eighteen, depending on the purpose for which jurisdiction is sought.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of September 8, 1948, is as follows:

"Your opinion is requested on the following matters:

"1. Can action on enforcement of compulsory school attendance against the parent or guardian who has control of (a) male child under the age of eighteen; (b) female child under the age of eighteen years, be taken by the Juvenile Court?

"2. Does the Juvenile Court have jurisdiction of a male child under the age of eighteen years who has married?"

You are advised that the Juvenile and Domestic Relations Court of Jefferson County has exclusive and original jurisdiction to try an action against a parent or guardian who fails to send a child to school in violation of Title 52, Section 302, Code of Alabama 1940. This does not mean, however, that the Juvenile and Domestic Relations Court of Jefferson County may try a parent or guardian for failure to send a child to school when the child is between the ages of sixteen and eighteen, for the reason that when a child arrives at the age of sixteen years, he or she is no longer required by law to attend school.

Children between the ages of seven and sixteen years must attend school. Title 52, Section 297, Code of Alabama 1940. If a parent, guardian, or other person having control of a child (between the ages of seven and sixteen years) fails to send such child to school, such person is guilty of a misdemeanor as defined in Title 52, Section 302, Code of Alabama 1940. I call your attention, however, to the fact that some children are exempt from attending school, as provided for in Title 52, Section 301, Code of Alabama 1940, as amended by Act No. 676, General Acts 1947, page 517. The requirement that children between the ages of seven and sixteen attend school, and the duty on the parent to send such children to school is not dependent on the sex of the child. The child is required to attend and the parent is required to send it, whether the child is a male or female.

Title 52, Section 316, Code of Alabama 1940, expressly gives the juvenile court exclusive jurisdiction of prosecutions of parents for failure to require their children between the ages of seven and sixteen to attend school. *Burrow vs. State*, 23 Ala. App. 41, 120 So. 306.

In Jefferson County, the Juvenile and Domestic Relations Court has been granted all of the powers and jurisdiction of ordinary juvenile courts. Title 62, Section 291, Subsections 11 and 14, Code of Alabama 1940. The Juvenile and Domestic Relations Court of Jefferson County is also

granted the original and exclusive jurisdiction in cases involving "the prosecution and punishment of persons for the violation of any laws or regulations or ordinances for the education of children * * *" Title 62, Section 291, Subsection 3, Code of Alabama 1940. It is clear, therefore, that the Juvenile and Domestic Relations Court of Jefferson County has original and exclusive jurisdiction in Jefferson County to try and determine criminal cases brought against parents or guardians violating Title 52, Section 302, Code of Alabama 1940. Before the parent is guilty, however, it must be found that the child is under sixteen years of age.

In answer to your second inquiry, you are advised that the Juvenile and Domestic Relations Court of Jefferson County may have jurisdiction in some instances of a male child under the age of eighteen years who has married. Your inquiry does not state the purpose for which jurisdiction is sought.

The Juvenile and Domestic Relations Court of Jefferson County would plainly have jurisdiction over a male child between the ages of sixteen and eighteen years when that child stands charged with a crime in some other court, and that court has transferred the case to the juvenile court. See Title 62, Section 311, Code of Alabama 1940; also Title 13, Section 363, Code of Alabama 1940. In such cases, it is my opinion that the marital status of the male child would have no bearing on the jurisdiction of the Juvenile and Domestic Relations Court of Jefferson County.

The Juvenile and Domestic Relations Court of Jefferson County would not have jurisdiction of a male child sixteen years of age or over, for the purpose of determining whether or not the child was a "dependent child," because a dependent child is defined by Title 62, Section 311, and Title 13, Section 350, Code of Alabama 1940, to be a child under sixteen years of age (insofar as the male is concerned) who is destitute, homeless, etc.

I have given the two above examples in order to show that the Juvenile and Domestic Relations Court of Jefferson County may or may not have jurisdiction over a male child under the age of eighteen years, depending on the purpose for which jurisdiction is sought.

If you will advise us for what purpose jurisdiction is sought, we will be in a better position to answer your question numbered 2.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

October 18, 1948.

Hon. Ward W. McFarland,
State Highway Director,
State Highway Department,

CAPITOL.

Highways—Highway Department—Contracts.

The State Highway Director has no authority to enter into a supplemental agreement with a contractor to build and construct a road after the completion of the contractor's original job.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of September 2, 1948, is as follows:

"The Alabama Highway Department had the following advertisements inserted in the July 29, August 5 and 12, 1948, issues of the 'Enterprise Chronicle,' a paper published in Coosa County.

"Federal Aid Secondary Project No. S-322(2), Coosa County, Alabama. Sealed bids will be received by the State Highway Director at the office of the State Highway Department, Montgomery, Alabama, until 10:00 A.M., August 13, 1948, and at that time publicly opened for constructing the Base and Single Surface Treatment on a County Road from Equality toward Alexander City. Length—11.049 miles.'

"The project is to be financed with Federal, State, and County funds and the successful bidder was J. B. Maynard, Alexander City, Alabama. The County, State, and Public Roads Administration have concurred in the bids and the contract has been awarded to the contractor. This project ends at the Tallapoosa County line which leaves a section of unimproved road in Tallapoosa County consisting of approximately 1.8 miles. The Probate Judge and the County Commissioners of Tallapoosa County have requested that we add this mileage of road to the contract that has been awarded to J. B. Maynard, with such project to be financed with State and County funds only.

"1. Will it be legal for me as Highway Director to execute a supplemental agreement with the contractor adding the 1.8 miles of road in Tallapoosa County to his contract at the unit price bid for the project in Coosa County?

"2. In the event the additional work had been located entirely in Coosa County, would it be legal for me as Highway Director to execute such a supplemental agreement?"

My answer to both of your inquiries is in the negative.

It appears from your request that the State Highway Department advertised and received bids for Project S-322(2), Coosa County, and upon the opening of the bids this contract was awarded to J. B. Maynard of Alexander City, Alabama. It further appears from your request that you now desire to enter into a supplemental agreement with Mr. Maynard for the construction of another project. In this regard your attention is called to Title 50, Section 1, Code of Alabama 1940, which reads as follows:

"Advertisements for bids and awards.—Before entering into any contract for a public improvement, the awarding authority shall advertise for bids for two consecutive weeks in a newspaper of general circulation in the county or counties in which the improvement or undertaking, or some part thereof, is to be made; the awarding authority may also advertise in such other publication as it may deem advisable. Such notices shall state that plans and specifications for the improvement are on file in the office of the authority, and the time in which the bids therefor will be received."

In my opinion, the entering into a supplemental agreement with Mr. Maynard on an entirely new project would be in the very teeth of the above-quoted code section. If it were possible for you to enter into this supplemental agreement, it would by the same token authorize you to enter into contracts for the construction of roads without complying with Section 1 of Title 50, *supra*, hereinabove quoted.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 20, 1948.

Hon. Norvelle R. Leigh, Jr.,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Filing Tax—Deeds—Mortgages.

Debenture agreement which does not convey any property, real or personal, as security held not subject to mortgage filing tax. Title 51, Section 619, Code of Alabama 1940.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of August 18, 1948, is as follows:

"Enclosed is a copy of an instrument styled a 'Debenture Agreement,' dated as of August 2, 1948, and executed by and between Mobile Battle House, Incorporated, a corporation, and The Merchants National Bank of Mobile, a national banking association, referred to in said instrument as the 'Trustee,' which has been presented to me for recording.

"Under the terms of the instrument, debentures in the aggregate principal sum of \$495,800 payable August 2, 1998, with interest at the rate of 4½ % per annum, payable periodically, are to be issued in exchange for 14,874 shares of the capital stock of Mobile Battle House, Incorporated.

"As I construe it, the Debenture Agreement merely provides for the payment of interest out of income when, as, and if earned, for the call of debentures prior to maturity, and for the creation of a sinking fund for the retirement of debentures when the debtor corporation declares a dividend in excess of \$25,000 on its stock in any year, payments into said sinking fund to equal the amount of such dividend, but not to exceed \$25,000 in any one year.

"No specific property, real or personal, is conveyed as security for the payment of the indebtedness to be evidenced by said debentures and, as I read the instrument, the only obligation assumed by the debtor corporation is to pay the debentures at maturity and to make certain other payments out of income to the registered holders of the debentures and to the Trustee.

"The attorneys representing the interested parties take the position that the instrument does not convey real or personal property or any interest therein and is, therefore, not subject to the privilege tax imposed by Section 619, of Title 51 of the Code of Alabama of 1940. With their view, I am inclined to agree.

"I, therefore, request your official opinion as to whether said instrument, on recording, is subject to the privilege or license tax imposed by Section 619, of Title 51, of the Code of Alabama 1940.

"In this connection, your attention is called to the opinion of the Attorney General, of July 21, 1941, to Honorable William Varner, Judge of Probate, Macon County (Quarterly Report of the Attorney General for the period July 1, 1941 to December 30, 1941, Volume XXIV, Page 55).

"After you have completed your examination of the enclosed instrument, please return it, along with your opinion, as it is the file copy of the attorneys representing the interested parties."

After having examined the attached Debenture Agreement, I am of the opinion that such instrument is not subject to the filing tax as provided for in Title 51, Section 619, Code of Alabama 1940.

The Debenture Agreement is too lengthy to quote in detail in this opinion, therefore, I have drawn the following conclusions as to the terms of said instrument: Under the terms of the instrument, debentures in the aggregate principal sum of \$495,800 payable August 2, 1998, with interest at the rate of 4½% per annum, are to be transferred to the Trustee for immediate issuance to stockholders in exchange for 14,874 shares of the capital stock of Mobile Battle House, Incorporated. The instrument further provides for the payment of interest out of income for the call of debentures prior to maturity, and for the creation of a sinking fund for the retirement of debentures when the debtor corporation declares a dividend in excess of \$25,000 on its stock in any one year, payments into said sinking fund to equal the amount of such dividend, but not to exceed \$25,000 in any one year.

No specific property, real or personal, is conveyed to the Trustee as security for the payment of the indebtedness to be evidenced by said debentures.

Said instrument is in substance merely a covenant to transfer to the Trustee in the future, under certain specified conditions, a percentage of the earnings of the Corporation, which sums are to constitute a sinking fund for the retirement of the debentures issued under such debenture agreement. This instrument does not operate as a transfer, assignment or conveyance of any property, personal or real, or any presently existing interest in property, personal or real.

Under Title 51, Section 619, Code of Alabama 1940, an instrument, to be taxable, must "convey real or personal property situated in this State or some interest therein," and as has been pointed out in the above paragraph, the instrument in question conveys none of these things.

Therefore, it is my opinion that the said instrument is not subject to the filing tax as provided for by Title 51, Section 619, Code of Alabama 1940. See Quarterly Report of Attorney General, Vol. 24, page 55.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

October 21, 1948.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Veterans—Licenses—Exemptions.

1. Disabled veterans entitled to certain exemptions from license can only have such license issued them in the county of which they are bona fide residents, and any further exemption to which such veterans are entitled in any other county of the State must be secured in the manner prescribed by Title 51, Section 862, Code of Alabama 1940, by having the judge of probate of such other county countersign such license.

2. Those veterans entitled to exemption from license irrespective of disability may claim such exemption in any one county of the State, without regard to their place of residence, but may not claim such exemption in more than one county.

3. Opinion of the Attorney General reported in Quarterly Report of Attorney General, Vol. 18, page 268, overruled and withdrawn.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of September 28, 1948, is as follows:

"A number of students in Auburn, who reside in various counties within the State, have established places of business in Auburn and have applied to me for veterans' exemptions on privilege licenses due on such places of business. In the past, I have refused to grant exemptions to such applicants, being under the impression that a veteran must be a resident of Lee County in order to obtain an exemption from this office.

"Will you please let me know whether I am correct in refusing to grant exemptions to non-residents of Lee County. Your early attention to this request will be very much appreciated."

As I am sure you know, there are two classes, or categories, of veterans entitled, under the laws of this State, to certain exemptions from the payment of license taxes. These are, first, disabled veterans, and, secondly, those veterans entitled by law to certain exemptions irrespective of disability. In your request, you fail to inform me as to the class of veterans with which you are concerned, and I shall, therefore, an-

swer your inquiry in the alternative, treating and considering each class in the respective order above set out.

The statutes relative to the former, i.e., disabled veterans, have long been a part of our law, being found set out in Title 51, Sections 852-864, Code of Alabama 1940, as amended. These statutes prescribe the qualifications to be met by those disabled veterans claiming exemption thereunder. Section 854 thereof, as amended by Act No. 366, General Acts 1945, page 589, provides, with reference to exemption from payment of county license, that

"Each such person who shall engage in, or carry on any businesses or occupations as a means of livelihood through the personal efforts of such person or through the personal efforts of such person and not more than one employee, helper, or apprentice, for which businesses or occupations license taxes are prescribed by or for any county of Alabama, shall be entitled to licenses from such county to so engage in, or carry on, such businesses or occupations upon payment of the license taxes so prescribed, less all, or such portion of, such license taxes as shall not exceed twenty-five dollars."

Section 862, *supra*, provides, with reference to the county of issue of such license, as follows:

"No license herein provided for shall be issued in any county other than the county wherein the disabled veteran is a bona fide resident, provided, however, that should a disabled veteran holding a veteran's license desire to engage in a business or occupation in a county in this state other than the county in which he has secured such veteran's license, he shall produce the license issued to him in the county of his residence to the probate judge of the county where he desires to do business and if the license in such other county together with the license issued in the county of his residence does not exceed the twenty-five dollars exemption herein granted he shall be exempt to such extent, and such probate judge shall countersign the license obtained in his county without charge or fee and it shall therefore be as valid as though issued by the probate judge of the county of his residence."

In view of the above statutes, it is my opinion that a disabled veteran, otherwise qualified, is entitled to an exemption from county license in each county in which he does business, provided the licenses issued do not in the aggregate exceed the maximum exemption of twenty-five dollars provided for therein. Biennial Report of Attorney General, 1936-38, page 700. However, such licenses can only be issued, and such exemptions granted, in the manner prescribed by Section 862, *supra*, that is, the license can only be issued in the county of which the claimant veteran is a bona fide resident, and any additional exemption, not in excess of the maximum prescribed, in any other county in which such veteran engages in business is to be secured by having the

judge of probate of such other county countersign the license as above prescribed.

As regards a determination of the place of which such disabled veteran is a "bona fide resident," it is my opinion that such question is a mixed question of law and fact, to be determined in the same manner as would such question be determined for other purposes, such as registration, voting, etc. In my opinion, the place of which one is a "bona fide resident" is the same as such person's "domicile." Based upon this premise, I deem the rules laid down in the case of *Ex Parte Bullen*, 236 Ala. 56, 181 So. 498, as applicable to the instant question, and, therefore, quote therefrom as follows:

"It is a familiar principle of law as well as political economy, that, residence at a particular place with the intention to remain there for an unlimited time, as a permanent place of abode constitutes domicile. A man can have but one domicile at one and the same time, though he may have numerous places of residence. 'His place of residence may be, and most generally is, his place of domicile, but it obviously is not by any means necessarily so, for no length of residence without the intention of remaining will constitute domicile.' Webster's New Int. Dict. 659; *Lucky v. Roberts*, 211 Ala. 578, 100 So. 878; *Pope v. Howle*, 227 Ala. 154, 149 So. 222."

It is, therefore, my opinion that should question arise concerning the bona fide residence of any claimant, such question is to be determined by you in the light of the rules above set out, based upon the expressed intention, acts and declarations of the party concerned.

An opinion of this office found reported in Quarterly Report of Attorney General, Volume 18, page 268, being inconsistent with the holding herein announced, such opinion is hereby expressly overruled and withdrawn.

Next considering your inquiry with regard to those veterans entitled by law to certain exemptions irrespective of disability, I would advise that I find no provision within the statutes relating to such veterans to the effect that such licenses must be issued or such exemptions granted in the county of which such claimant is a bona fide resident. The statutes relative to the exemption of this class of veterans are of recent enactment and of temporary duration, having been established by Act No. 356, General Acts 1945, page 570, and subsequently amended by Act No. 698, General Acts 1947, page 535.

It is provided by Act No. 356, *supra*, with respect to exemption of county licenses that:

"Such veterans who shall engage in or carry on any businesses or occupations for which license taxes are prescribed by any county of Alabama shall be entitled to licenses from the county to engage in or carry on those businesses or occupations upon the payment of

the license taxes prescribed, less, as regards each veteran, such portion of the license taxes as shall not exceed \$35.00. However, no such veteran may claim the exemption in more than one county."

In my opinion, any such veteran, otherwise qualified, may claim the exemption above granted in any county of the State, restricted only by the provision that no such veteran may claim such exemption in more than one county. It is, therefore, my opinion that veterans, otherwise qualified, falling within the latter class, even though not bona fide residents of Lee County, may claim such exemption in such county, provided they have not claimed and been granted such exemption in any other county of the State.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 22, 1948.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses.

Amount of liability for plumber's license under Title 51, Section 574, Code of Alabama 1940, is based upon population of city or town in which such person is doing business, and the fact that the boundaries of the city or town extend into two or more counties does not give rise to additional liability for said license.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of October 9, 1948, is as follows:

"Please advise this office on the following:

"Title 51, Section 574, Code of Alabama, 1940, requires that each person doing business as a plumber is liable for a license. A ruling of the Attorney General found in Bound Volume 1934-36, page 393, states that liability for plumber's license is based on doing business as a plumber rather than having an established place of business. In this county we have a firm at Tallassee that employs a plumber to install various appliances and heaters, etc. The store being located in Elmore County and part of the town being in Elmore and part in Tallapoosa with the firm doing business in

both counties. Please advise if under these conditions this firm would be required to buy a plumber's license in both counties in order to do business in the town of Tallassee."

I am of the opinion that your inquiry must be answered in the negative.

Title 51, Section 574, Code of Alabama 1940, reads as follows:

"§574. Plumbers, steam fitters, tin shop operators, etc.—Each person doing business as a plumber, steam fitter, or operator of a tin shop or roofing shop, in towns or cities of fifty thousand inhabitants, or over, twenty-five dollars; in cities and towns of ten thousand inhabitants and less than fifty thousand inhabitants, fifteen dollars; in cities and towns of less than ten thousand inhabitants, ten dollars; in all other places, whether incorporated or not, five dollars."

You will note that the above quoted Code section provides that the license shall be taken out for each town or city in which any person is "doing business as a plumber, etc." The amount of the license is dependent upon the population of the city or town. There is no mention whatsoever of the county as being the unit of measure for such license. Thus, the fact that the boundaries of a town or city extend into two or more counties does not give rise to additional liability for said business license.

Further, your attention is invited to an opinion of this office found in Biennial Report of Attorney General, 1930-32, page 413, which holds that when a person is doing business as a plumber, he is liable for said license where the business is done, and if the business be carried on in more than one place, then there is liability for said license in whatever towns or cities where liability exists under law. Said opinion interpreted Schedule 87 of Section 361 of the Revenue Act of 1919, which schedule is in substance the same as the one under consideration.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 22, 1948.

Hon. Wm. J. Kern, Clerk of the Inferior Criminal Court
of Mobile County,
Mobile 21, Alabama.

Alabama Alcoholic Beverage Control Board — Intoxicating
Liquors—Beer.

Whether a particular community in a wet county answers the legal requirements for the sale of draft or keg beer, is a question of fact which addresses itself largely to the determina-

tion by the ABC Board in the exercise of its sound discretion and judgment. Title 29, Section 34, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of September 2, 1948, is as follows:

"Please favor me with your official opinion as to the following question:

"It is our understanding of the law that both Mobile and Baldwin Counties have concurrent jurisdiction on the bridges and causeway intersecting the two counties; is it legal to sell draught beer thereon?"

Title 29, Section 34, Code of Alabama 1940, in pertinent part provides:

" . . . All malt or brewed beverages must be sold or dispensed from bottles, cans, or other container not to exceed one pint or sixteen ounces. There shall be no draft or keg beer or malt beverages sold or dispensed within this state; provided, however, in rural communities with a predominantly foreign population, after the payment of the tax imposed by this chapter, draft or keg beer may be sold or dispensed by special permit from the board, when in the judgment of the board, the use and consumption of draft or keg beer is in accordance with the habit and customs of the people of any such rural community. Such permit shall be promptly revoked by the board, if, in its judgment, the same tends to create intemperance, or is prejudicial to the welfare, health, peace, temperance and safety of the people of the community or of the state. . . ."

As a prerequisite to the sale or dispensing of draft or keg beer in wet counties, the statute sets up four conditions, to-wit: (1) draft or keg beer can be sold or dispensed only in rural communities; (2) the population of such communities must be predominantly foreign (3) consumption of draft or keg beer must accord with the habit and customs of the people of such rural communities; and, (4) draft or keg beer can be sold or dispensed in such communities only under special permit issued by the Alcoholic Beverage Control Board.

In regard to the third requirement, it must be noted that whether or not the use and consumption of draft or keg beer is in accordance with the habit and customs of the people of such rural communities, is a question of fact to be resolved by the Alcoholic Beverage Control Board, in the exercise of its sound judgment, subject to review by the courts in event of an abuse thereof. If the said board decides that question in the affirmative, and the other requirements are present, the board has author-

ity under the statute to issue a special permit. Section 34, supra, contemplates that the Board grant such special permits after thorough investigation, not only of the applicants, but of all the surrounding circumstances. More is involved than the routine discharge of a ministerial duty.

The Alcoholic Beverage Control Board has a wide discretion in the issuance of original licenses for the sale of malt or brewed beverages. *State ex rel. Krasner et al. v. Alabama Alcoholic Beverage Control Board*, 246 Ala. 198, 19 So. 2d 841. It is noted from Section 34, supra, that the Board is empowered to revoke a license authorizing the sale or dispensing of draft or keg beer when, in its judgment, such permit tends to create intemperance, or is prejudicial to the welfare, health, peace, temperance and safety of the people of the community or of the state. Thus, both the issuance of the permit and its continuing validity rest in the judgment of the Board. Therefore, I am of the opinion that, whether or not draft or keg beer may be sold on the bridges and causeway connecting Mobile and Baldwin counties is a question for administrative determination which addresses itself to the sound discretion and judgment of the Alcoholic Beverage Control Board. Should that Board determine that the statutory essentials for the sale and dispensing of draft or keg beer are present, the statute empowers the Board to issue special permits for its sale. I assume that, in your particular case, there has been an administrative determination, by the Board, that the statutory essentials are present.

In answering your inquiry, this office takes judicial notice of the fact that both Mobile and Baldwin Counties are wet counties. Therefore, the question of concurrent jurisdiction is not involved.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

October 27, 1948.

Hon. Roy E. Blair,
Tax Assessor,
Madison County,
Huntsville, Alabama.

Taxation by Municipalities.

A motor vehicle owned by a resident of a municipality and used within the corporate limits thereof is subject to municipal ad valorem tax, even though such vehicle is nightly garaged without the corporate limits thereof.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of October 13, 1948, is as follows:

"Inasmuch as the Code of Alabama does not give very many specific instances as to ad valorem CITY tax, I am requesting the following opinion:

"Example: X Warehouse is located within the city limits of Huntsville and assesses a truck in their name. They state that this truck is garaged nightly OUTSIDE the city limits, and is used by the business both in business transactions inside and outside the city limits.

"My question is this: Should we collect a city tax on this vehicle?"

"Please give me your opinion at the earliest possible date. I am holding up this assessment until your reply."

It is my opinion that your question should be answered in the affirmative.

By Amendment 8 of Section 93, Article 4 of the Constitution of Alabama of 1901, the City of Huntsville has the authority to levy an ad valorem tax on property situated within its corporate limits.

Authorities are numerous which cite the principle that for purposes of taxation, the domicile or residence of the owner is the situs of the property. From 51 American Jurisprudence, page 461, Section 447, I quote in part as follows:

"The domicil of a person for purposes of determining the place at which his personal property is taxable is ordinarily fixed by application of the rule which determines the legal domicil of a person for any other purpose which is, generally speaking, the place of his fixed permanent home or residence to which he has, whenever absent, the intention of returning and from which he has no present intention of removing. * * * * *

The fact that the truck is garaged nightly outside of the corporate limits of Huntsville cannot, in my opinion, exempt the truck from city taxes since the truck is owned by an individual, group of individuals, or corporation whose permanent place of business is the City of Huntsville. Furthermore, the truck daily enjoys police, fire and other protection afforded it by the municipal corporation of Huntsville, Alabama.

It is my opinion, therefore, that the City of Huntsville has the right to collect the city tax on this vehicle.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 27, 1948.

Honorable R. R. Wright,
Judge of Probate,
Marion County,
Hamilton, Alabama.

Officers and Offices—Judge of Probate.

1. A person appointed to fill a vacancy in the office of judge of probate holds office, by virtue of such appointment, until the next general election for any State officer held at least six months after the vacancy occurs, and until his successor is elected and qualified.

2. His successor is authorized to assume the duties of the office as soon after the general election in which he is elected as he receives a certificate of his election, takes the oath of office prescribed by the Constitution, and gives such bond, or bonds, as are required by law, which he may do at any time within forty days after the declaration of the result of the election.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of September 3, 1948, is as follows:

"In March 1947 the Probate Judge, George Pearce, died. On April 3rd 1947 I took over the office by appointment of Gov. Folsom. In the primaries of 1948 I was defeated by Frank Pearce, the present Tax Assessor. The nominee, Frank Pearce, will be elected in the Nov. General Election. This is what I am asking: First, there will have to be an appointment to fill the vacancy caused by Frank Pearce leaving to become Judge of Probate. Now the question that I am asking you to decide upon is: When he will take over. Street corner talk is soon after the Secretary of State declares the election. Some say the regular time of exchange near the 15th or 20th of Jan. following. Preference to me personally would be the Jan. time but of course would want it to be legal. Kindly advise me."

Constitution of Alabama 1901, Section 158, which governs the filling of a vacancy in the office of judge of probate, reads as follows:

"Vacancies in the office of any of the justices of the supreme court or judges who hold office by election, or chancellors of this state, shall be filled by appointment by the governor. The appointee shall hold his office until the next general election for any state officer held at least six months after the vacancy occurs, and until his successor is elected and qualified; the successor chosen at such election shall hold office for the unexpired term, and until his successor is elected and qualified." (Emphasis supplied.)

It is settled law in this State that the words "until his successor is elected and qualified" were never intended to prolong the term of office beyond a reasonable time, after the election, to enable the newly elected officer to qualify. *Prowell v. State ex rel. Hasty et al.*, 142 Ala. 80, 39 So. 164; *State ex rel. Foster v. Rice*, 230 Ala. 608, 162 So. 292.

General elections are held in this State on the first Tuesday after the first Monday in November of the even numbered years. Title 17, Chapter 1, Article 5, Code of Alabama 1940.

On Friday next after the election, the returns are canvassed by the Board of Supervisors, and immediately thereafter a written, public declaration of the result (certificate of election) is made by filing the original in the office of the judge of probate and by posting a copy thereof at the courthouse door. Such original certificate is recorded in the office of the judge of probate, and said record, or a duly certified copy thereof, constitutes prima facie evidence of the result of the election and the declaration thereof as provided by law. Title 17, Sections 199-200, Code of Alabama 1940. The judge of probate must immediately forward such certificate to the Secretary of State as to all civil officers who are to be commissioned by the Governor, with exceptions not here material. Title 17, Section 209, Code of Alabama 1940.

A judge of probate is required to give bond. Title 41, Section 87, Code of Alabama 1940. If he is chairman of his county governing body, he is required to give an additional bond as such chairman. Title 41, Section 75, Code of Alabama 1940. Such bonds must be filed within forty days after the declaration of the result of the election. Title 41, Section 45, Code of Alabama 1940. A judge of probate must also be commissioned by the Governor. Title 41, Sections 10-11, Code of Alabama 1940. However, his commission may not issue until he has made his bond and had the same properly approved and filed. Title 41, Section 12, Code of Alabama 1940. Nevertheless, he is authorized to exercise the duties and functions of his office after he has received a certificate of his election, as provided by law, whether he has received his commission or not, but he must first give such bond as is required by law and take oath of office as prescribed by the Constitution. He may provide himself with a certificate of his election by obtaining a certified copy of the same from the judge of probate. Cf. *Draper v. State, ex rel. Patillo*, 175 Ala. 547, 57 So. 772.

Applying the above cited statutory provisions to the instant situation, it follows that your successor will be elected in the general election

to be held on the first Tuesday after the first Monday in November, 1948; that the returns of his election will be canvassed and the result thereof declared on Friday next thereafter; that immediately thereafter he may provide himself with a certificate of election; and that he is authorized to exercise the duties and functions of his office as soon thereafter as he takes the oath of office prescribed by the Constitution and gives the bond, or bonds, required by law, which he may do at any time within forty days after the declaration of the result of the election.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 28, 1948.

Honorable Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Licenses.

Under statutes providing that licenses become due and payable on October first of each year and delinquent on November first thereafter, the fact that the last day of the period of grace for the payment of such licenses falls on Sunday in a particular year does not operate to extend the date of delinquency.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of October 20, 1948, is as follows:

"Title 51, Section 851 provides that all privilege licenses become delinquent on November 1st of each year.

"Since the 31st of October, the last date licenses could be paid without penalty falls on Sunday the question has arisen as to whether the privilege licenses could be paid on Monday, November first without a penalty.

"I will appreciate an early ruling on this question since the time is growing short and I failed to find an opinion covering this question."

Title 51, Section 851, Code of Alabama 1940, reads as follows:

"Except as otherwise provided, all licenses or privilege licenses payable hereunder shall be due on October first of each year and

shall be for one year ending September thirtieth following, and shall be delinquent on the first day of November of each year."

To the same effect is Title 51, Section 835(c), Code of Alabama 1940.

It is clear from the express wording of these statutes that licenses within their purview are due on October first of each year and are delinquent on the first day of November thereafter. See *State on Behalf of Henry, Commissioner of Licenses, v. State ex rel. Hotel Tutwiler Operating Company*, 230 Ala. 657, 162 So. 365, and *McDowell v. Henry*, 238 Ala. 663, 193 So. 108.

In my opinion, the fact that October thirty-first, the last day of the grace period for the payment of such licenses, falls, as it does in 1948, on Sunday, does not alter the situation.

The rule of computing time (Title 1, Section 12, Code of Alabama 1940) is not here applicable, as the above-cited statutory provisions do not prescribe a certain number of days during which licenses may be paid, but, on the contrary, fix a date on which they become due and payable (October first), and a later date on which they become delinquent (November first). Cf. Quarterly Report of Attorney General, Volume 26, page 9, and authorities therein cited, wherein it was held that although February first, the last day under the statute for the payment of poll taxes, falls on a Sunday in a given year, a tax collector has no authority to receive poll taxes on the following Monday, February second. See, also, 52 American Jurisprudence, Time, Sections 20 and 21.

Consequently, I advise you that the fact that October thirty-first, the last day of the grace period for the payment of licenses within the purview of the above-cited statutory provisions, falls on Sunday in a particular year does not operate to extend the date of delinquency.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 29, 1948.

Hon. J. Wyatt Stuart,
Judge of Probate,
Jackson County,
Scottsboro, Alabama.

Jackson County—Fine and Forfeiture Fund.

1. There is no method provided by Act No. 647, Local Acts 1939, page 368, approved July 10, 1940, for the transfer of surplus monies in the Jackson County Court Fine and Forfeiture Fund to the general fund of the county.

2. The only means by which surplus monies in the Jackson County Court Fine and Forfeiture Fund can be transferred

to the general fund of the county is by a legislative amendment to that effect of Act No. 647, Local Acts 1939, page 368, approved July 10, 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of October 13, 1948, is as follows:

"The Jackson County Court was created by the Local Acts of 1939, page 368. At the time of the creation of the Court, the County, out of its General Fund, appropriated a considerable amount of money to establish the Court. Since that time the County Court fine and forfeiture fund has accumulated a surplus over and above all claims against it of approximately \$13,000."

"I will thank you to advise me how and in what way this surplus can be transferred from the County Court to the General Fund of the County."

The Jackson County Court was created by Act No. 647, Local Acts 1939, page 368, approved July 10, 1940, and is, therefore, a statutory court of limited jurisdiction.

It is my opinion that there is no way provided by law by which the surplus accumulated in the Jackson County Court Fine and Forfeiture Fund can be transferred from that fund to the general fund of Jackson County.

The only statute that authorizes the transfer of funds from the fine and forfeiture fund is Title 12, Section 34, Code of Alabama 1940, which provides for the transfer of any balance in the fine and forfeiture fund to the general fund of the county. This section applies to the county fine and forfeiture funds and does not apply to a fine and forfeiture fund created by a local act. Title 12, Section 34, Code of Alabama 1940, is as follows:

"§ 34. Transfer of fine and forfeiture fund to general fund.—The county treasurer of any county in this state may transfer any balance on hand at the end of the fiscal year of the fine and forfeiture fund in excess of the registered claims and lawful claims or charges against said fund to the general fund or to any special fund to which by resolution of the board of revenue, or court of county commissioners, expressed in writing and spread upon the minutes of the court, he may be directed."

Section 24 of Act No. 647, Local Acts 1939, *supra*, which creates a Fine and Forfeiture Fund for the Jackson County Court is pertinent to your present inquiry. Section 24 reads as follows:

"Section 24. That there is hereby created a Fine and Forfeiture Fund for the Jackson County Court of Jackson County, Alabama, to be known as the Jackson County Court Fine and Forfeiture Fund; and that, from and after the passage of this Act all fines and forfeitures assessed and collected in said Court shall be deposited in said Fine and Forfeiture Fund of the Jackson County Court."

It can be seen that Section 24 of the Act provides no method by which the surplus in the Fine and Forfeiture Fund of the Jackson County Court can be transferred from that fund to the general fund of the county, nor do any of the sections of the act preceding or succeeding Section 24 provide a method for such a transfer.

It is my opinion, therefore, that the only way the surplus funds can be transferred from the Jackson County Court Fine and Forfeiture Fund to the general fund of Jackson County is by action of the Legislature of the State of Alabama, that is, by an amendment to that effect to Act No. 647, Local Acts 1939, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 29, 1948.

Mrs. Marie B. Owen,
Director,
Department of Archives and History,
CAPITOL.

Officers and Offices—Archives and History—Libraries—State.

Under Title 55, Sections 278-284, Code of Alabama 1940, the salary of the Director of the Public Library Service Division in the Department of Archives and History may be fixed in an amount equal to, or \$50.00 per month in excess of, the fixed statutory salary of the Director of the Department of Archives and History.

Opinion by Assistant Attorney General Screws.

Dear Mrs. Owen:

Your request for an official opinion, bearing date of October 18, 1948, is as follows:

"At a meeting of the Executive Board of the Public Library Service Division on September 23, 1948, the following motion was presented and unanimously adopted by the Board.

"That the Chairman be directed to secure from the Attorney General of the State a ruling on the legality of the action of the

members of this Board which resulted in raising the salary of the Director of the Public Library Service Division of the Dept. of Archives and History to figures, first equal to, and subsequently \$50.00 per month in excess of the salary of the Director of the Department.'

"The Public Library Service Division was created by and operates under Title 55, Sections 278-284 of the Code of Alabama 1940.

"Section 279 dealing with the appointment, powers and duties of the Executive Board provides in part as follows:

"'It shall be the duty and power of the Executive Board to conduct the affairs of the Division, to administer the funds received from the treasurer that are allocated to the Public Library Service Division, and be responsible for the Division's program and such other activities as would naturally be administered by an executive board.'

"Section 280 dealing with the duties and powers of the Division provides in part as follows:

"'The Division may receive and shall administer all funds, books or other property, from whatever source, under such conditions as may be deemed necessary in order to carry out the purpose of the article.'

"Section 281 dealing with the powers of the Director of the Division provides in parts as follows:

"'The board shall appoint a director who shall be a graduate of an accredited library school, shall have had a minimum of three years of library experience in an administrative capacity, and who is not a member of the executive board.'

"'In addition to their salaries, the director and the assistants shall be allowed their actual expense while absent from the Division office in the service of the Division.'

"On May 16, 1946 the Executive Board of the Public Library Service Division, with all six members present and voting, voted unanimously to allow the Chairman of the Board to set the salaries of all present and future employees of the Division. On the same day the Chairman authorized a raise of \$27.75 per month for the Director, making her salary \$327.75 per month.

"Subsequently the Chairman authorized a second raise for the Director to become effective on November 1, 1946, of \$22.25 per month, making her salary \$350.00 per month.

"Both of these increases were approved by the Executive Board at a meeting on November 21, 1946, with all members present and voting.

"Subsequently the Chairman authorized a raise of \$25.00 per month for the Director, to become effective October 1, 1947, making her salary \$375.00 per month.

"On September 30, 1947, before this increase was to become effective the Board in a meeting with all members present and voting, unanimously approved said increase.

"Subsequently the Chairman authorized a raise of \$25.00 a month for the Director, to become effective July 1, 1948, making her salary \$400.00 per month. This increase was confirmed by the Board by a majority vote with all members present and voting at a meeting on September 23, 1948. At the same time the Board approved the salary for the Director for the new fiscal year of the Division.

"Your opinion is respectfully requested on the legal question raised by the above motion."

In answer to your inquiry, it is my opinion that the action of the Executive Board of the Public Library Service Division in the State Department of Archives and History, which resulted in raising the salary of the Director of the Division, to figures equal to, and subsequently \$50.00 per month in excess of, the salary of the Director of the Department, was legal and authorized.

The Public Library Service Division in the State Department of Archives and History was established under the provisions of Act No. 171, General Acts 1939, page 297, approved March 17, 1939. This act now appears in Title 55, Chapter 7, Article 3 (Sections 278-284), Code of Alabama 1940. In construing the 1939 act, *supra*, and particularly Section 4 thereof (which is now Section 281 of Title 55, *supra*, and quoted in pertinent part in your letter of inquiry), this office held that the Director of the Public Library Service Division is endowed with no part of the sovereign power of the State, has no fixed term of office or salary, but holds office at the pleasure of the Executive Board of the Division, which Board in turn fixes the salary of the said Director and prescribes the duties of said employee. Quarterly Report of Attorney General, Volume 17, page 121.

I know of no provision of law which would prevent the Executive Board of the Division from fixing the salary of the Director of the Division in an amount equal to, or \$50.00 per month in excess of, the fixed statutory salary of the Director of the Department of Archives and History prescribed by Title 55, Section 268, Code of Alabama 1940, as amended by Act No. 396, General Acts 1943, page 364.

The remaining question to be determined is whether the method of making the several changes in the salary of the said Director of the

Division, in the manner set out in your letter of inquiry, is of legal effect. In my judgment, this query should be answered in the affirmative. Although the several increases in the salary of the said Director were first made by the Chairman of the Executive Board of the Division (in accordance with a resolution of the Board), rather than by the Board itself, yet in each instance there was a formal ratification by the Board of the actions of the Chairman. Since the Board had the authority to so fix the salary of the said Director in the first instance, it later could legally ratify the actions of its duly delegated agent who was specifically designated to fix said salary. The formal ratification by the Board of the actions of the Chairman thereof in the matter under consideration, in my opinion, was authorized and of binding legal effect.—Cf Quarterly Report of Attorney General, Volume 17, page 299; Quarterly Report of Attorney General, Volume 22, page 234.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 2, 1948.

Mrs. Marie B. Owen, Director,
Department of Archives and History,
State of Alabama,
CAPITOL.

History and Archives—Funds.

The Department of Archives and History may require a nominal charge for uncertified copies, photostats or microfilms of its materials but said charge must not be in excess of the actual cost of such reproduction.

Opinion by Assistant Attorney General McQueen.

Dear Mrs. Owen:

Your request for an official opinion, bearing date of October 18, 1948, is as follows:

"Reference is had to your opinion, dated August 5, 1948, to Hon. Walter B. Jones, State Geologist, written by Assistant Attorney General Hardin, in which you advise (1) 'The Geological Survey may require a nominal charge for the issuance of publications of such agency,' and (2) 'The funds accruing therefrom may be utilized by the Geological Survey for the purpose of defraying expenses of the Survey, for library purposes, or otherwise.'

"As the archival and historical agency of the State, this Department has operated, for several years, in connection with its work, some sort of reproductive equipment, such as a portograph,

photostat, or microfilm equipment, and during this entire time has followed the practice of also selling reproduction of some of the materials here for sums slightly in excess of the actual cost, and utilizing the funds thus derived in connection with the work of this Department. The reproductions sold have not been certified copies, but only photostats or microfilms. It is not a business enterprise, but only incidental, and is not in any wise in competition to regular business establishments which would not have access to these materials for reproduction purposes, since the materials could not be taken out, nor could the business establishments bring in their bulky equipment. This Department has regarded the sale of these copies as merely an administrative or ministerial function under the Department's duty to 'diffuse knowledge in reference to the history of the State.' This practice has enabled this Department to increase its collections and its usefulness without increasing its cost to the State.

"Your opinion is therefore desired as to whether or not this Department comes within the above cited opinion, viz.:

"(1) May the Department of Archives and History require a nominal charge for uncertified copies, photostats or microfilms of its materials, and

"(2) May the Department of Archives and History utilize the funds accruing therefrom for the purpose of defraying expenses of the Department, for library purposes, or otherwise."

The opinion, dated August 5, 1948, to the Honorable Walter B. Jones, State Geologist, written by Assistant Attorney General Hardin, referred to in your letter, is applicable to your present inquiry. However, you state in your inquiry that the Department of Archives and History has followed the practice of selling reproductions of some of its materials for sums slightly in excess of the actual cost.

The term "nominal charge" as used in the opinion of Assistant Attorney General Hardin hereinabove referred to, contemplate within its meaning any charge in excess to actual cost.

Therefore, I am of the opinion that the Department of Archives and History may charge a nominal sum to cover actual cost of uncertified copies, photostats or microfilms of its materials but may not include within this charge a sum slightly in excess of the actual cost.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

November 9, 1948.

Mrs. Sadie P. Gardner,
Tax Assessor,
Dallas County,
Selma, Alabama.

Taxation—Licenses—Motor Vehicles—Federal Reservations.

1. Motor vehicles owned by persons who are entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act are not subject to ad valorem taxes or the motor vehicle license required by the laws of the State of Alabama, provided such persons have paid the license, fee or excise required by the State of their domicile or residence.

2. Motor vehicles owned by individuals (who are not entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act) residing on Government reservations located within the State of Alabama, over which the State has ceded "exclusive jurisdiction" to the United States, are not subject to ad valorem taxes, but are subject to the motor vehicle license levied by the State of Alabama, if used on the public highways of this State.

3. Motor vehicles owned by individuals (who are not entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act) residing on Government reservations located within the State of Alabama, ceded to the United States after May 31, 1941, are subject to ad valorem taxes, and to the motor vehicle license levied by the State of Alabama, if used on the public highways of this State.

Opinion by Assistant Attorney General Culverhouse and Assistant Attorney General Tiller.

Dear Madam:

Your request for an official opinion, bearing date of October 30, 1948, is as follows:

"The question has arisen in this county as to whether automobiles belonging to government personnel, which cars are the personal property of said personnel, are subject to the ad valorem taxes, where they are kept on Craig Field, a Federal Government Reservation, located here at Selma.

"These particular individuals live on said reservation, and consequently keep their cars thereon.

"The real estate comprising this reservation was deeded in fee simple to the Federal Government by the City of Selma on October

26, 1948. Prior to that time, it is my understanding, said real estate was only leased by the City of Selma to the Federal Government for the purpose of said air field and Federal Reservation.

"The questions, therefore, arise as to whether said automobiles, belonging to said individuals and kept on said Army Reservation, are subject to ad valorem taxes levied by the State on automobiles under the following conditions:

"1. Prior to the conveyance of said property comprising the Reservation by the City of Selma to the Federal Government on October 26, 1948, and when said property was only leased by the City of Selma to the Federal Government for said air fields.

"2. Whether said individuals would be subject to said ad valorem taxes on their automobiles kept on said Army Reservation after said property was deeded by the City of Selma to the Federal Government for said Reservation on October 26, 1948.

"In view of the fact that I am now in the process of assessing said ad valorem taxes, which assessments will have to be completed by November 15, it is most urgent that I have a ruling by you on these inquiries by Friday, November 5.

"Your attention is called to the fact that I already have discussed these facts with Mr. Burton and Mr. Tiller of your office."

The Congress of the United States enacted the Selective Service Act of 1948, Public Law No. 759, 80th Congress. Section 14 of said Act reenacted the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. Thus, in answering your request we must be guided by the provisions of such Soldiers' and Sailors' Civil Relief Act, as amended. Title 50, Section 574, United States Code Annotated, reads in part as follows:

"§ 574. Residence for tax purposes. (1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is

not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district: Provided, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax prior to October 6, 1942.

"(2) When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, that the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid. Oct. 17, 1940, c. 888, § 514, as added Oct. 6, 1942, c. 581, § 17, 56 Stat. 777, and amended July 3, 1944, c. 397, § 1, 58 Stat. 722."

In view of the above-quoted statutory provision, I am of the opinion that such persons who are entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act, and who have qualified for such exemptions as therein provided, are not liable in the State of Alabama for either the motor vehicle license or the ad valorem tax thereon. However, let me emphasize that the above conclusion is based upon a full compliance by such persons with the provisions of the said Act which qualifies such exemption of motor vehicles as follows: "Provided, that the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled, has been paid."

However, such license as purchased by these persons from the state of their domicile or residence must be good for the current tax year for which purchased.

Such nonresident persons who are entitled to the benefits of said act and who elect to purchase an Alabama motor vehicle license rather than obtain such license from the state of their domicile or resident, are not liable for the Alabama ad valorem tax upon such motor vehicle. Such election to obtain an Alabama motor vehicle license may be made without penalty within such time as may be obtained without penalty in the state of his residence or domicile (as construed by the Soldiers' and Sailors' Civil Relief Act).

You will note that the above referred to act does not exempt such qualified persons who are citizens of the State of Alabama and who

are serving within the State of Alabama. Therefore, the liability of such persons for the motor vehicle license and the ad valorem tax thereon shall be determined in the same manner as is the liability of other persons residing on military installations who are not entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act.

The liability for the State motor vehicle license and the ad valorem tax thereon of this second class of persons, that is, those persons who are not entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act, is directly dependent upon the individual government reservation on which such person is residing.

In former opinions this office has ruled extensively on this broad question of liability of such persons for both the ad valorem tax and the motor vehicle license as required by the State of Alabama. I specifically invite your attention to the holding of this office found in Quarterly Report of Attorney General, Vol. 25, page 124. In that opinion this office, after first ruling specifically that motor vehicles owned by individuals residing on property within the State of Alabama (Craig Field) leased to the Federal Government for military purposes for a period of ninety-nine years or less, are subject to ad valorem taxes, and to the motor vehicle license levied by the State of Alabama, if used on the public highways of this State, did then rule as follows:

"The above serves to answer your specific inquiry, but I deem it advisable to utilize this opportunity to give my opinion on all aspects of this general subject, in view of the changes in the statutory law of this State governing the cession by the State, of property located within the State of Alabama, to the United States, made by the Code of Alabama 1940.

"This office, in an opinion rendered to Hon. S. R. Butler, State Tax Commissioner, Capitol, under date of May 20, 1931, Biennial Report of Attorney General, 1930-32, page 287, held that motor vehicles owned by individuals residing on government reservations located within the State of Alabama, over which the State had ceded 'exclusive jurisdiction' to the United States, were not subject to ad valorem taxes levied by the State of Alabama, but were subject to the motor vehicle license levied by the State of Alabama, if used on the public highways of this State. Similar holdings were reached in opinions of this office rendered to the State Board of Administration, State Capitol, Montgomery, Alabama, under date of May 15, 1929, Biennial Report of Attorney General, 1928-30, page 369, and to Hon. John C. Curry, Chief Clerk, Ad Valorem Tax Department, State Tax Commission, Capitol, under date of November 9, 1933, Biennial Report of Attorney General, 1932-34, page 408. The holdings of these opinions are here reaffirmed. This rule applies to all motor vehicles owned by individuals residing on government reservations located within the State of Alabama, purchased or acquired by the United States, and ceded to the United States by the State of Alabama, prior to May 31, 1941, the effective date of

the Code of Alabama, 1940. The statutory law of this State governing the cession by the State, of property located within the State of Alabama, to the United States, in effect prior to that time, provided for the cession of 'exclusive jurisdiction' over such property. See *State v. Blair*, 238 Ala. 377, 191 So. 237.

"As to motor vehicles owned by individuals residing on government reservations located within the State of Alabama, purchased or acquired by the United States, and ceded to the United States by the State of Alabama on or after May 31, 1941, the effective date of the Code of Alabama, 1940, a different ruling obtains. Motor vehicles owned by individuals residing on such reservations are subject to ad valorem taxes levied by the State of Alabama, as well as the motor vehicle license levied by the State of Alabama, if used on the public highways of this State. This for the reason that the cession of such property by the State of Alabama to the United States on and after May 31, 1941, is governed by the provisions of Code of Alabama, 1940, Title 59, Sections 1-19. Section 19 of this title reads as follows:

"§ 19. Jurisdiction of United States over ceded lands.—The jurisdiction heretofore ceded to the United States over any lands acquired by it within the State of Alabama, with the consent of the State, shall be subject to such reservations, restrictions, and conditions as provided in the act or instrument of cession relating to such acquisition; and shall be subject to the exercise by the state of such jurisdiction, rights, privileges, or powers as may now or hereafter be ceded by the United States to the state. The jurisdiction ceded to the United States over any lands hereafter acquired by it within the State of Alabama, with the consent of the state, pursuant to the provisions of this title or any other law of the state, unless otherwise expressly provided in the act or instrument of cession, shall be subject to the following reservations, restrictions, or conditions. The jurisdiction so ceded shall not prevent the execution upon such lands of any process, civil or criminal, issued under the authority of this state, except as such process might affect the property of the United States thereon. The state expressly reserves the right to tax all persons, firms, corporations, or associations now or hereafter residing or located upon such lands. The state expressly reserves the right to tax the exercise by any person, firm, corporation, or association or any and all rights, privileges, and franchises upon said lands; and to tax property of all persons, firms, corporations, or associations situated upon such lands. The jurisdiction ceded to the United States shall be for the purposes of the cession and none other; and shall continue during the time the United States shall be or remain the owner thereof and shall use such lands for the purpose of the cession. The state expressly reserves the right to exercise over or upon any such lands any and all rights, privileges, powers, or jurisdiction which may now or hereafter be released or receded by the United States to the state.' (Emphasis supplied.)

"From the above-quoted section, it can be seen that the State of Alabama expressly reserves the right to tax the property of all persons, firms, corporations or associations situated upon any lands located within the State of Alabama acquired by the United States, and ceded by the State of Alabama to the United States after the effective date of the Code of Alabama, 1940."

Similar holdings were reached in a recent opinion of this office found in Quarterly Report of Attorney General, Vol. 50, page 218. The holdings of that opinion, and those of the opinion hereinabove quoted, are here reaffirmed.

Thus, applying the above cited authorities to your specific request, I am of the opinion that motor vehicles owned by persons who are not entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act, but who reside on the Federal Reservation now known as Craig Field, are subject to ad valorem taxes, and to the motor vehicle license levied by the State of Alabama, if such vehicle is used on the highways of this State.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 10, 1948.

Hon. Walter P. Gewin,
Deputy Solicitor,
Hale County,
Greensboro, Alabama.

Officers and Offices—Courts of County Commissioners—
Employers and Employees—County Engineer.

Member of court of county commissioners cannot be employed by the county engineer as a machine operator.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of October 28, 1948, is as follows:

"The purpose of this letter is to request an official opinion from you as to the employment by Hale County, Alabama, of a Commissioner whose term of office will begin in January, 1949.

"A party who has been employed by Hale County for some time as a machine operator has been nominated in the Democratic Primary to the office of Commissioner for the County. It is assumed

that he will be elected and take office in January, 1949. Hale County regularly employs a county engineer who has charge of employing machine operators. The employee mentioned is employed by the county engineer and is subject to his orders and directions as to his employment and the discharge of his duties.

"In your opinion, after the employee mentioned becomes County Commissioner, may he lawfully continue his employment with the County as a machine operator?

"Reference is made to Title 41, Section 211; to opinion rendered by Attorney General September 1, 1927, Biennial Report of Attorney General 1926-28, page 272; opinion of Attorney General, Biennial Report 1926-28, page 351, dated November 3, 1927; and opinion of the Attorney General, Biennial Report 1936-38, page 160, dated March 25, 1937."

In answer to your question, it is my opinion that a member of the court of county commissioners may not be lawfully employed by the county engineer as a machine operator. Title 41, Section 211, Code of Alabama 1940, provides, in pertinent part, as follows:

"County officers interested in county contracts.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract, for work or services of the county, or is employed in any way under such contract, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; * * * *"
(Emphasis supplied.)

The provisions of this section would forbid the employment as outlined in your inquiry. Opinions of the Attorney General, Office Edition 1926, January 4-September 30, 1948, Vol. 1, page 96; Quarterly Report of Attorney General, Vol. 41, page 26; Biennial Report of Attorney General, 1930-32, page 369; Biennial Report of Attorney General, 1926-28, page 351.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

November 10, 1948.

Hon. W. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Publication—Newspapers and News Stands—Notices.

The Montgomery Examiner, a newspaper of general circulation in Montgomery County, which has been published weekly for more than fifty-two consecutive weeks, is qualified to carry legal advertisements and notices as provided in Title 7, Section 713, Code of Alabama 1940.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of November 5, 1948, is as follows:

"The Montgomery Examiner, a newspaper published in Montgomery County, I am informed, has published consecutive weekly issues since December, 1946, and that it is printed in whole in Montgomery County, Alabama.

"Will you please advise me if, under those facts, it is qualified as a medium for publication of legal advertisements. I call your attention to Title 7, Section 713, Code of Alabama 1940.

"I will appreciate it if you will give me an early reply."

You further advise this office that The Montgomery Examiner is a newspaper, which is printed in the English language and which has a general circulation in Montgomery County, and has been mailed under the second class mailing privilege of the United States Post Office Department for fifty-two consecutive weeks or more.

Your attention is invited to these specific provisions of Title 7, Section 713, Code of Alabama 1940, which reads, in pertinent part, as follows:

"Designation of newspaper and regulations regarding printing and publishing of legal advertisements.— * * * * but all publications required by any law or mortgage or other contract to be published in a newspaper must be printed in whole or in part and published in the county in which the advertisement is published and must be published in a newspaper printed in the English language which has a general circulation in the county in which it is published, which newspaper shall have been mailed under the second class mailing privilege of the United States post office department from the post

office where it is published for fifty-two consecutive weeks. Provided, that if there is no newspaper printing plant in the county where the advertisement is published, the printing may be done in another county in the State of Alabama."

From the information furnished in your request, it appears that The Montgomery Examiner fully meets the requirements of the above quoted statutory provision. Therefore, I am of the opinion that The Montgomery Examiner is an authorized publication for legal advertisements and notices which are to be published in Montgomery County, Alabama.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 10, 1948.

Hon. Thomas G. Etheredge,
Mayor, Town Creek,
Lawrence County,
Town Creek, Alabama.

Officers and Offices—Municipalities—Bonds.

1. A mayor of a town may not hold any other salaried position in the town.
2. A town clerk must give bond.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of September 24, 1948, is as follows:

"I was elected Mayor of Town Creek, Ala. September 20, 1948. A five member board of aldermen was elected at the same time.

"This is a small town with a population of about 800. We have a city water system of 130 meters. A city clerk is employed for 14 days per month at \$100.00 @. Is it permissible for the Mayor to do the work of the city clerk and receive pay, if the board of aldermen approve? The salary of the Mayor is \$30 to \$40 a month.

"Is it not desirable for the city clerk or person handling the town finances to make bond?"

In my opinion, Title 37, Section 452, Code of Alabama 1940, would prohibit a mayor of a town from holding the position of town clerk or any other salaried position in the town. Section 452, supra, is, in pertinent part, as follows:

"Mayor and alderman accepting employment from public service corporation vacates office.—* * * * * And any mayor or alderman, or other member of the governing body of any municipality who shall have any private or personal financial dealings with, for or on account of the municipality, except such as are imposed by his official position, or who shall render any service or do any work or supply any commodity, for financial compensation, payable out of the funds of the municipality, shall be guilty of a misdemeanor, and the doing of such act shall constitute grounds for impeachment of such person."

See, also, Quarterly Report of Attorney General, Vol. 21, page 154.

In answer to your second question, the town clerk must give bond as outlined in Title 37, Section 425, Code of Alabama 1940, which is as follows:

"Additional duties; bond—The clerk, in addition to these enumerated duties, shall perform any and all duties that may be required of him, by ordinance or resolution. He shall give bond with sureties, to be approved by the mayor, in such sum as the council may prescribe."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 10, 1948.

Hon. A. R. Meadows,
State Superintendent of Education,
State of Alabama,
CAPITOL.

Constitutionality—Schools—State Department of Education—
City Boards of Education—Teachers.

1. United States Supreme Court's decision in the *Vashti McCollum* Case does not outlaw elective non-sectarian instruction from King James Bible in public schools of Alabama, provided such instruction is from an historical, narrative, biographical or literary standpoint, and without reference to any religious sect, society, denomination or mode of worship.

2. A local board of education offering such instruction by outside teachers lawfully may accept donations and gifts to finance the costs, in whole or in part, of such instruction.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of August 24, 1948, is as follows:

"On October 11, 1939, the Attorney General of Alabama ruled in the affirmative on the teaching of the Bible and religion in the public schools of Alabama, provided such courses do not stress any particular sect, creed, or denomination, but embrace a study of the Bible or religion from a historical, narrative, biographical, and literary standpoint. (Quarterly Report of the Attorney General of Alabama, Vol. XVII, Pg. 68-75). Recently the Supreme Court of the United States in the case of 'PEOPLE OF THE STATE OF ILLINOIS ex rel. VASHTI McCOLLUM V. BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71 CHAMPAIGN COUNTY, ILLINOIS et al,' decided that the program of religious education offered in the Champaign School District was unconstitutional. The City School System of Birmingham, Alabama, has under consideration a plan for non-sectarian Bible instruction which is described as not a course in religious education, but to have the Bible taught as a piece of literature with no emphasis on sectarian doctrine and your opinion is requested on the following questions:

"1. Is it legal for a public school to offer an elective course in non-sectarian Bible instruction with the Bible taught from a historical, narrative, biographical, or literary standpoint provided the course is approved as an elective course by the State Department of Education and is taught by teachers certified by the State?

"2. If the answer to question No. 1 is yes, can the local board of education accept gifts and donations and finance the operations of such courses from such donations and gifts?

"3. If the answer to question No. 1 is yes, is the King James version of the Bible acceptable for such a course?"

In the 1939 opinion rendered by this office, found in Quarterly Report of Attorney General, Volume 17, page 68, it was held that courses in Bible and religion can be taught as electives in the public schools of Alabama, provided the courses do not stress any particular sect, creed or denomination, but embrace a study of the Bible or religion from an historical, narrative, biographical and literary standpoint. It was further held that before credit toward graduation can be given for such courses, the same must be placed upon the approved elective course list by the State Department of Education, and must be conducted by a certificated teacher.

Those conclusions were, in my judgment, sound. The question now presented is whether they are sound today in view of the recent decision

of the United States Supreme Court in the *Vashti McCollum* case. See *People of the State of Illinois ex rel. Vashti McCollum v. Board of Education of School District No. 71, Champaign County, Illinois et al* (U. S.), 68 S. Ct. 461, 92 L. Ed. 451 (1948).

In that case, it was held that tax-established and tax-supported public school buildings cannot lawfully be used for purposes of sectarian religious instruction of pupils, compelled by law to attend public schools for secular education, under an elective "released time" arrangement. The conclusion was reached that such arrangement violates the first restraint of the First Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, and breaches this nation's historic "wall of separation" between Church and State, by constituting an "establishment of religion" by the State. While the decision does little to provide a standard by which the constitutionality of diverse religious practices can be measured, it announces two general principles: (1) Tax-supported buildings cannot be used for the "dissemination of religious doctrines," (2) The State cannot afford to sectarian groups aid in helping to provide pupils for their religious classes through use of the State's compulsory public school machinery. These two majority doctrines would logically seem to preclude any religious activity in public school buildings during school hours.

In the *Vashti McCollum* case, involving mandamus proceedings instituted by an avowed atheist, the religious instruction was sectarian, being given by outside teachers furnished by a religious council representing the various faiths, including Jews, Catholics and Protestants. Each pupil electing to receive the instruction was given sectarian religious instruction in the pupil's own faith. Thus, while the ultimate implications on the decision may be clarified by future decisions, for the present its specific holding is that tax-supported public school buildings and administrative machinery cannot be used for the propagation of particular sects, creeds or denominations, even though elective. In my judgment, the decision is not broad enough to outlaw elective non-sectarian instruction from the King James Bible from a cultural, literary and historical standpoint. It bans only sectarian classes in public school buildings.

Mr. Justice Jackson points out in his concurring opinion the principal difficulties of furnishing children with an adequate secular education without some allusion to religion and its effect on history and culture. A former attorney general has given expression to that difficulty in these words:

"Its literary value is universally acknowledged. An American would be poorly educated indeed who did not have some familiarity with the exalted teachings of the Bible and its moral precepts. It was not intended that this book, because accepted by thousands as the inspired word of God, and because many find in it the assurance of a better life, should be excluded from the public schools of the State." See Biennial Report of Attorney General, 1924-1926, page 196.

In my opinion, elective non-sectarian study of the Bible does not constitute religious education. Nor is its study from a cultural standpoint a religious activity. While undoubtedly it exercises a religious influence, the same can be said for other branches of secular education, such as music and art. I construe such study, when not used as a vehicle for affirmative propagation of religion, to be cultural education, analagous to a study of any other religious literature, painting or music.

Under the plan your board proposes, Bible instruction certainly is not compulsory. The plan does not involve a drawing of lines between sectarian groups during school hours, an element present in the *Vashti McCollum* case, or a commingling of religious with secular instruction. It does not involve utilization of the public school system to aid religious groups to spread their faith, or the proselyting of pupils for religious classes. Nor does the plan do violence to those sections of our own State Constitution providing that no preference shall be given by law to any religious sect, society, denomination or mode of worship and that public school monies shall not be used for the support of any sectarian or denominational school. See Section 3, Article 1, and Section 263, Article 14, Constitution of Alabama 1901.

1. Therefore, I do not conclude that the United States Supreme Court has overruled or modified the 1939 opinion of this office, and so your first question is answered in the affirmative.

2. Title 52, Section 38, Code of Alabama 1940, provides that property, money or other thing of value may be donated for the benefit of the public schools of this state to be held in trust and administered for the use of such schools. Therefore, your second question is answered in the affirmative.

3. There is ample authority in this county to the effect that the King James Bible is not sectarian, and it has been so held in a previous opinion by this office. See Bennial Report of Attorney General, 1924-1926, page 196, which construed Title 52, Section 542, Code of Alabama 1940, requiring daily readings from the Holy Bible in the public schools of Alabama, as constitutional. But Protestants and Catholics disagree as to the correct version, while non-Christians would certainly find the New Testament sectarian. An atheist would discard the whole as sectarian. That question, however, is not controlling when the King James Bible is studied as an elective strictly from a cultural standpoint. When so used, it serves merely as a textbook and not for the purpose of religious indoctrination. I know of no constitutional prohibition against a similar study of the sacred writings of Mohammedanism, Confucianism, Hinduism, or any other religion, each of which clearly is sectarian from the standpoint of Christianity. To withdraw from the classroom of secular education all study of the world's great systems of religion, is, to that extent, denial of secular education. In my opinion, such study tends no more towards the "establishment of religion" than does a study of the Rubaiyat of Omar Khayyam, which admittedly is standard class-

room literature. Therefore, your third question likewise is answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 12, 1948.

Hon. Charles F. Hackmeyer, Member,
Board of Revenue and Road Commissioners,
Mobile County,
Mobile, Alabama.

Mobile County—Merit System.

1. The governing body of Mobile County is authorized to establish a system of vacation and sick leave privileges for its non-merit-system employees.

2. The governing body of Mobile County is not required to include in the regular pay roll submitted to the Personnel Board the names of persons paid by Mobile County who are not in the classified service of the Mobile County Civil Service System.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 24, 1948, is as follows:

"Your official opinion is promptly requested on the following important public questions, viz:

"(1) May not the governing body of Mobile County, in the interest of the public and its non-merit system employees, establish and provide a system of vacation and sick leave privileges for such employees?

"(2) Is the governing body of Mobile County required to include in the regular payrolls submitted to the Personnel Board for the approval of its Director, the names of persons paid by Mobile County who are not in the classified service as defined in the Mobile County Merit System Act?

"For your information, reference is hereby made to Local Act No. 470 of 1939, approved September 15, 1939 (Local Acts 1939, pp. 298-318), and acts amendatory thereof. As to question (1) above, I am advised that modern opinion and authority holds it

to be in the public interest that employees of political subdivisions be provided, and paid for, vacation and sick leave privileges, and that a governing body such as Mobile County has implied power and authority to do this as to its employees not within our local classified service, such as common laborers. See Section 2 of above local act. For Mobile County not to be able to do this seems an unwarranted discrimination against a number of good and faithful employees.

"As bearing on question (2) above, your attention is invited to Sections 2 and 8 of the local merit system act. It does not seem to me requisite or proper for the names of any person or County employee to be included upon the payroll submitted for the Personnel Director's approval except those as are embraced within subdivision 7 of Section 8 of said local Act.

"Your prompt reply will be appreciated."

In my opinion, the governing body of Mobile County may establish and provide a system of vacation and sick leave privileges for those employees who are not in the classified service of the Mobile County Civil Service System (Act No. 470, Local Acts 1939, page 298).

It is further my opinion that the governing body of Mobile County may refuse to include in the regular pay roll submitted to the Personnel Board for the approval of its director the names of the persons paid by the county who are not in the classified service of the Mobile County Civil Service System (Act No. 470, supra).

Your inquiry number one does not describe the employees to which you refer, except that those employees are "non-merit system employees." I assume that you refer to regular employees, who are paid by the county and whose terms and conditions of employment are fixed by the county pursuant to some statute.

It is my opinion that the county governing body has implied authority to establish and provide a system of vacation and sick leave privileges for such employees.

In an opinion of this office under date of May 10, 1948, addressed to Hon. Tom B. Ward, County Attorney, Tuscaloosa County, we held that the county governing body of Tuscaloosa County had authority to grant vacations with pay to its employees who were engaged in building roads and bridges. In said opinion, it was stated:

"It is common knowledge that employees are more contented and, therefore, perform their duties in a more efficient manner when they are given a vacation with pay each year."

This opinion further states that since the governing body had the right to fix the compensation of certain employees, the compensation

so fixed may include a vacation with pay. In my opinion, the same reasoning applies to sick leave privileges.

Since there may be certain regular employees paid by Mobile County who are not under the provisions of the Mobile County Civil Service System, and since the governing body of Mobile County has authority to set the terms and conditions of employment, including compensation for such employees, it is my opinion that as to those employees the terms and conditions of employment, including compensation, may include a vacation with pay and sick leave privileges.

Of course, those employees in the classified service of the Mobile County Civil Service System (Act No. 470, *supra*) have their vacation and sick leave privileges established by the rules of the Personnel Board, for the reason that Section IX, subsection (c) of the local act, *supra*, provides, "Among other things, such rules shall provide . . . the hours of work, attendance regulations, and leaves of absence for employees in the classified service; . . ."

In answering your second inquiry, we have before us Rule No. 14.1 and Rule No. 14.2 of the Personnel Board of Mobile County, Alabama, adopted January 13, 1940, and effective February 1, 1940. Rule No. 14.2 prescribed the form for pay rolls submitted to the director of personnel for approval. It is provided in said Rule No. 14.2 that the pay rolls shall include the names of employees in the unclassified service.

The Personnel Board of Mobile County has authority to promulgate reasonable rules and regulations (Section IX, Local Act No. 480, *supra*). It is provided in said local act, however, that the director of personnel is required to approve only those pay rolls of persons in the classified service.

"It shall be unlawful for any County or City official, officer or employee, or any other officer, to pay or cause to be paid any salary or compensation to any person in the Classified Service, of Mobile County or any City therein, for personal services, unless the pay-roll, estimate, voucher, or account for such salary or compensation, containing the name of the person to be paid shall bear the certification of the Director that the person or persons named therein are employees of the County or City and are legally entitled to receive the sums stated therein."

Thus, before an employee in the classified service can be paid legally for his services, his name must appear on a pay roll or other paper, together with the sum of his compensation, and the pay roll or other paper must bear the certification of the director of personnel. This requirement by the express terms of Section XXVIII, *supra*, applies only to classified employees and not to those in the unclassified service. Since Rule No. 14.2, *supra*, attempts to require more than is required by the local act, *supra*, it is my opinion that, insofar as said rule requires names

of unclassified employees to be included on pay rolls submitted to the director for approval, said rule is void.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

November 15, 1948.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
CAPITOL.

Costs and Fees.

Costs and fees, court costs discussed generally.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of October 18, 1948, is as follows:

"When the State of Alabama, or one of its agencies, is a party in litigation, much difficulty and delay in collecting cost when same is taxed against the State is often experienced.

"I would like for you to discuss generally, in an official opinion to me, the proper procedure, method of collecting and the fund from which the cost is payable, in any cause, whether criminal, civil or equity, when the cost is taxed against the State."

In answer to your inquiry, we here set out a summary of the rules followed by the Attorney General's Department in approving cost bills wherein the costs are taxed against the State of Alabama. These rules were distributed to the clerks and registers of the circuit courts several months ago.

There is no general statute requiring the Attorney General to approve the payment of court cost bills submitted to the State. Certain statutes in particular cases expressly require the approval of the Attorney General (Title 29, Section 254, Code of Alabama 1940. When decree rendered against State in condemnation proceedings against vehicles transporting prohibited liquors.) Certain court cost bills are submitted to him probably by custom and probably because the State Comptroller is unable to determine from our laws whether costs should be paid or not.

Custom also dictates the mode of submitting cost bills to the Attorney General for approval. It is necessary for the clerk or register to perform the following acts:

1. Submit duplicate copies of the bill itself. (One for the State Comptroller, one for the department from whose funds the costs are payable.)
2. Each copy should be itemized as are other cost bills.
3. Each bill should contain an affidavit of the clerk or register that the costs are true and correct and that the costs are due, correct and unpaid.
4. The bill or some paper attached thereto should show the nature of the cause of action and the judgment rendered by the court—this means that it should be plain for what purpose the suit or action was brought. Perhaps the best way for showing this is to attach a copy of the original pleading or complaint together with the judgment entry. Instead of attaching these copies, however, the clerk or register may simply state in substance what the purpose of the cause of action was and what judgment the court entered.

Note: This last feature (stating purpose of the cause of action) is essential for in approving cost bills for payment, the Attorney General designates the fund in the State Treasury from which payment should be made.

A statement of the judgment rendered is necessary to show that the State has failed or that execution has issued against the defendant and returned "no property found."

The above may be called the formal requisites of a cost bill payable by the State.

HOW TO DESIGNATE THE FUND FROM WHICH THE STATE SHOULD PAY COURT COSTS

Funds of Department of Revenue:

Title 51, Section 893, Code of Alabama 1940, provides:

"§ 893. Payment of court costs.—Any court costs taxed against the state, shall be paid by the state, and the various taxing subdivisions thereof in proportion to the amount of taxes levied by each. The sworn certificate of the clerk or register approved by the Comptroller shall be authority for the issuance of any payment of warrants therefor by the proper officers of each taxing authority, and shall be treated as a preferred claim."

Examples of cases payable under this section:

1. Appeals to circuit court from valuation of Board of Equalization.
2. Suit to collect license tax.

Law Enforcement Fund:

Title 29, Section 254, Code of Alabama 1940, provides:

"§ 254. Payment of costs when decree rendered against state.— In all cases filed under this article for the purpose of condemning and selling conveyances and vehicles of transportation of any kind on account of their use in the transportation of prohibited liquors or beverages, if a decree shall be rendered against the state the court costs shall be paid out of the law enforcement fund provided for in this article, said payment to be made on warrant of the comptroller, upon receipt by him of the bill of costs certified as being correct by the register of the circuit court in which such case shall have been tried, which cost bill should also bear the approval of the attorney general and the governor before warrant shall be drawn."

Examples of cases where costs are payable under this section:

1. Suit is brought to condemn an automobile for transporting prohibited liquor; the judgment when rendered is against the state. Suits of this nature are usually styled State, ex rel (name of solicitor) v. One 1938 Ford Automobile, serial number 323076.

As required by the statute, the cost bill should bear the approval of the Attorney General and the Governor.

Unemployment Compensation Administration Fund:

Title 26, Section 248, Code of Alabama 1940, as amended by Act No. 310, General Acts 1943, page 281, approved June 28, 1943, provides as follows:

"§ 248. Unemployment compensation administration fund.— A. There shall be in the treasury a special fund to be known as the unemployment compensation administration fund. All moneys which are deposited or paid into this fund are hereby appropriated and made available to the director. All moneys in this fund shall be expended solely for the purpose of defraying the cost of the administration of this chapter, and for no other purpose whatsoever. The fund shall consist of all moneys appropriated by this state, and all moneys received from the United States of America, or any agency thereof, including the social security board, the railroad retirement board, or from any other source, for such purpose. All moneys in this fund shall be deposited, administered, and disbursed, in the same manner and under the same conditions and requirements as is provided by law for other special funds in the treasury. Any balances in this fund shall not lapse at any time, but shall be continuously available to the director for expenditure consistent with this chapter. The treasurer shall give a separate and additional bond conditioned upon the faithful performance of his duties in connection with the unemployment compensation adminis-

tration fund in an amount to be fixed by the director and in a form prescribed by law or approved by the attorney general. The premiums for such bond of the treasurer and the premiums for the bond given by the treasurer of the unemployment compensation fund under section 198 of this title shall be paid from the moneys in the unemployment compensation administration fund.

"B. All moneys received after June 30, 1941 from the Social Security Board under Title III of the Social Security Act, or any unencumbered balances in the unemployment compensation administration fund as of that date, or any moneys granted after that date to this state pursuant to the provisions of the Wagner-Peyser Act, or any moneys made available by the state or its political subdivisions and matched by such moneys granted to this state pursuant to the provisions of the Wagner-Peyser Act shall be expended solely for the purposes and in the amounts found necessary by the Social Security Board for the proper and efficient administration of this chapter. If any of such moneys are found by the Social Security Board, because of any action or contingency, to have been lost or been expended for the purposes other than or in amounts in excess of, those found necessary by the Social Security Board for the proper administration of this chapter, it is the policy of this state that such moneys shall be replaced by moneys appropriated for such purpose from the general funds of this state to the unemployment compensation administration fund for expenditure as provided in subsection A of this section. Upon receipt of such a finding by the Social Security Board, the director shall promptly report the amount required for such replacement to the governor and the governor shall at the earliest opportunity, submit to the legislature a request for the appropriation of such amount. This subsection shall not be construed to relieve this state of its obligation with respect to funds received prior to July 1, 1941, pursuant to the provisions of Title III of the Social Security Act; provided, however, that funds which have been expended by the director or his predecessors in office, in accordance with a budget approved by the Social Security Board, or its successors, and in accordance with the general standards and limitations promulgated by the Social Security Board or its successors, prior to such expenditure (where proposed expenditures have not been specifically disapproved by the Social Security Board or its successors) shall not be deemed to require replacement."

Example of cases where costs are payable from this fund:

1. Bill brought by Director of Department of Industrial Relations to enforce delinquent contributions. (Title 26, Section 240, Code of Alabama 1940.)

Note: Formerly it was stated to this department (Attorney General) that this fund consisted entirely of Federal Funds.

Governor's (Contingent or) Emergency Fund:

Title 55, Section 105, Code of Alabama 1940, provides as follows:

"§ 105. Emergency appropriations and the method of their use.— To the end that all expenses of the state may be brought and kept within the budget, the budget appropriation bills shall contain a specific sum or sums as an emergency appropriation or appropriations. Such sum shall not, however, exceed two percent of the total amount appropriated by such bill. The manner of allotment of such emergency appropriation shall be as follows: Any department, board, bureau, commission, agency, office or institution of the state or any person or persons in charge of any activity in which the state is interested, desiring an allotment out of such appropriation, shall present such request in writing to the department of finance with such information as it may require, and, such request shall be handled and allotments may be made pursuant thereto as in the case of regular allotments. Such allotments shall be made only for any purpose authorized by law for which no specific appropriation has been made or for which inadvertently an insufficient appropriation has been made."

The Supreme Court, in the case of *State v. Inman*, 239 Ala. 348, 195 So. 448, said as follows:

"(13). It may be well to indicate that court costs adjudged against the state may be paid out of a due appropriation to any department for which the name of the state is employed and is acting, or out of the available general fund of the state when so acting and suing for the state's general fund, revenues or properties. If there are no such general or special funds that may meet such payment, under the Budget Act, then such costs may be allowed and paid out of the appropriation to the Governor's contingent fund or the Governor's emergency fund, or from available funds appropriated for the State Board of Adjustment and allowed as a proper claim against the state. *Ballenger Const. Co. v. State Board of Adjustment*, 234 Ala. 377, 175 So. 387; *Turner v. Lumbermens Mut. Ins. Co.*, 235 Ala. 632, 180 So. 300; General Acts 1935, p. 1164; General Acts 1936-37, Sp. Sess. p. 205."

Thus, when there is no appropriate fund and the costs are nevertheless payable by the State, payment may be made from the emergency fund.

1. Liquor nuisance abated under Title 29, Section 152, Code of Alabama 1940, when court does not make and enter an order additional to the order taxing costs against defendant costs are chargeable against State. When Court makes additional order taxing same vs. State costs are payable from fine and forfeiture fund. Quarterly Report of Attorney General, Vol. 26, p. 112, states:

"Therefore, since it appears that there was no order entered by the trial judge assessing the costs against the State of Alabama in this case, as provided by Section 152, *supra*, it is my opinion that the costs in the same are not a charge against the General Fund or any other fund of your county, the Fine and Forfeiture Fund having been abolished.

"With the above clarification of the Boyd opinion, I now adhere to the ruling therein set out. That is to say, that in liquor nuisance cases where the State of Alabama is successful, and the costs are assessed against the defendant, but are not collected from him, and the court does not assess that part of the costs created at the instance of the State against the State, then this part of the costs becomes a charge against the State, and is payable out of the Governor's Contingent Fund or the Governor's Emergency Fund, upon the approval of the Governor."

See also Quarterly Report of Attorney General, Vol. 19, page 129.

2. Any other public nuisance case.
3. Disbarment proceedings where Bar Association funds are not used to pay costs.
4. Any other case where State should pay costs and there is no particular fund.

Milk Control Board Fund:

Title 22, Section 221, Code of Alabama 1940, provides:

"§ 221. Disposition of license fees and fines.—The executive secretary and financial officer shall deposit all monies received by him under the provisions of this chapter with the treasurer, auditing said money through the comptroller's office, as is provided for other funds paid into the treasury, and all such money is hereby appropriated to the milk control board to defray the expenses incurred in carrying out and enforcing the powers and duties granted and imposed by this chapter, which shall be paid out of the treasury upon warrants drawn by the comptroller, upon approval by the financial officer and any one member of the board, but the milk control board shall in no event issue warrants in a total amount in excess of the sums of money paid by it into the treasury. All monies collected by the milk control board under any prior act of the legislature, which the board has on hand or on deposit in the treasury at the expiration of such prior act or at the commencement of this chapter are hereby appropriated to the milk control board for use in carrying out the provisions of this chapter, the same as other monies collected by it from license fees provided by this chapter. All monies paid by the milk control board into the treasury shall

be placed in a special fund therein, to be known as 'milk control board fund,' and used only for the purpose of the administration of this chapter. The milk control board shall have authority to borrow money and to pledge license fees accruing during the then current license year for the payment thereof, in the carrying out of its duties in the administration of this chapter. The books and records of the milk control board shall be subject to state audit, the same as any other state agency."

See Biennial Report of Attorney General, 1936-1938, page 497.

Agricultural Fund:

Title 2, Section 34, Code of Alabama 1940, provides as follows:

"§ 34. Control of agricultural fund.—The commissioner of agriculture and industries, with the approval of the state board of agriculture and industries, shall use the agricultural fund in accordance with the provisions of law for the support and expense of the regulatory, control and administrative work of the department of agriculture and industries, and in such manner as said board deems will best effect the purposes of all laws included in this chapter. The commissioner of agriculture and industries, with the approval of the state board of agriculture and industries, shall direct the expenditure of said fund, it being the purpose hereof to vest the financial supervision and control over the use of said fund for the work and activities assigned to the department of agriculture and industries in the manner provided by law."

Title 2, Section 33, Code of Alabama 1940, provides as follows:

"§ 33. Purpose for which agricultural fund used.—The agricultural fund shall not be expended upon any work or activity of any department, institution, bureau, commission, board or other state activity, which work or activity is specified in chapters 3 and 4 of this title, or which is assigned to any other department, institution, bureau, commission, board, or state agency other than the department of agriculture and industries, or which is not definitely assigned to and defined as a part of the proper work of said department of agriculture and industries. Said fund shall be expended exclusively for the expenses of the regulatory control and administrative work of the department of agriculture and industries, except as otherwise expressly provided by law."

Conservation Fund:

Title 8, Section 235, Code of Alabama 1940, provides as follows:

"§ 235. Practice of forestry upon school lands; enforcement of state fire and trespass laws.—The director of conservation is hereby empowered to have forestry practiced upon school lands, to supervise and inaugurate sound practices of forestry thereon, to put into

effect and enforce state fire and trespass laws on said lands and to do all things which in his opinion he deems advisable to be done for the best interests of the state concerning school lands." (Emphasis supplied.)

Therefore, the Director of Conservation has authority to do what he deems proper in relation to school lands and this would authorize his bringing suit in such matters. However, no law authorizes the payment of court costs in relation to school lands from the Conservation Fund. Such costs should, therefore, be paid from the Governor's Emergency Fund, Title 55, Section 195, Code of Alabama 1940, *supra*; see *State v. Inman*, 239 Ala. 348, 195 So. 448.

(Court costs paid in case of *Board of School Commissioners of Mobile County v. Ben C. Morgan*, as Director of the Department of Conservation, involving school lands, January 8, 1946.)

RULES GOVERNING PAYMENT OF COSTS BY THE STATE

Section 14, Constitution of Alabama of 1901:

"That the State of Alabama shall never be made a defendant in any court of law or equity."

It was formerly held that the State, when it was plaintiff and failed, could not be taxed with costs in the absence of a statute. *Collier, Governor v. Powell & Bradley*, 23 Ala. 579; 59 C. J. 332. See this case cited in *State v. Pullman-Standard Car Mfg. Co.*, 235 Ala. 493, 501, 179 So. 541.

Title 7, Section 292, Code of Alabama 1940, provides as follows:

"§ 292. State may bring suit in circuit court.—The state may sue in the circuit court in equity matters, and the suit is governed by the same rules as suits between individuals. The solicitor of the circuit in which the suit is pending must attend to the same on the part of the state, and the governor may employ assistant counsel, if he deem it necessary and the circuit judge may determine the amount of compensation; and if unsuccessful, the state is liable for costs as individual suitors are. The direction of the governor of the state in writing is sufficient authority to the attorney for bringing such suit."

Title 11, Section 65, Code of Alabama 1940, provides as follows:

"§ 65. Costs given to successful party, or apportioned at discretion of court.—The successful party in all civil actions is entitled to full costs for which judgment may be rendered, unless in cases otherwise directed by law, or by the judgment of the court. The court may apportion the costs at his discretion as justice and equity may require; and this provision is applicable in all cases in which

the state is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security; but this section shall not apply to justice of the peace courts; but in such courts, the successful party shall recover his costs."

The *Inman* case (*State v. Inman*, 239 Ala. 348, 195 So. 448, April 4, 1940) holds that when the State is plaintiff and fails, costs may be taxed against the state under the provisions of the above Code sections. It is further held that these Code sections do not violate Section 14 or Section 213 of the Constitution of Alabama of 1901. However, costs must be paid out of current revenues for the year.

The following excerpt from the *Inman* case is important:

"It may be well to indicate that court costs adjudged against the state may be paid out of a due appropriation to any department for which the name of the state is employed and is acting, or out of the available general fund of the state when so acting and suing for the state's general fund, revenues or properties. If there are no such general or special funds that may meet such payment, under the Budget Act, then such costs may be allowed and paid out of the appropriations to the Governor's contingent fund or the Governor's Emergency fund, or from available funds appropriated for the State Board of Adjustment and allowed as a proper claim against the state.—*Ballenger Const. Co. v. State Board of Adjustment*, 234 Ala. 377, 175 So. 387; *Turner v. Lumbermens Mut. Ins. Co.*, 235 Ala. 632, 180 So. 300; General Acts 1935, p. 1164; General Acts 1936-37, Ex. Sess., p. 205."

COURT COSTS IN CRIMINAL CASES

When a defendant is convicted in a criminal case and sentenced to the penitentiary (felony) the costs are taxed against the defendant. Certain items are payable from the "Convict Fund" (Funds of the Department of Corrections and Institutions) because Title 45, Section 69, Code of Alabama 1940, provides as follows:

"§ 69. Costs of conviction; items to be paid.—Whenever a defendant is convicted, and sentenced to the penitentiary the following items of costs in the case shall be paid out of the convict fund, to the extent and in the manner hereinafter prescribed, to-wit: For issuing each *capias* or warrant (once), fifty cents; docketing cause, ten cents; issuing each subpoena for state's witnesses, twenty-five cents; each undertaking or recognizance, and entering same, fifty cents, trial, fifty cents; entering judgment, twenty-five cents; final judgment, twenty-five cents; record for supreme court (per hundred words), fifteen cents; making final record (per hundred words), fifteen cents; making transcript and certificate thereof (per hundred words), fifteen cents; entering forfeiture against defendant, fifty

cents; sheriff's fees, executing each warrant or writ of arrest, four dollars; approving bond, one dollar; serving each subpoena for state witnesses, fifty cents; for committing prisoners to jail, one dollar; for summoning jury in capital cases, three dollars; state witnesses' fees, which are fixed at seventy-five cents per diem before the grand jury and seventy-five cents per diem before the court of conviction, and five cents per mile for each mile traveled to and from the grand jury and court of conviction, but no witnesses shall be entitled to fees in more than one case on the same day cost of committing magistrate and constables on preliminary trial, both together not to exceed five dollars; court stenographer's fee not to exceed three dollars; and when the conviction is secured by a solicitor other than a solicitor who is paid a salary by the state, or when the solicitor is paid a salary by the county, such bill of costs shall also include the solicitor's fee, which is now or may be allowed by law."

For those court costs not paid for by the convict department, an execution may be issued against the defendant for the payment thereof because Title 11, Section 83, Code of Alabama 1940, provides as follows:

"§83. Costs, how taxed and collected.—The fees specified in this article are to be collected and paid as follows: (a) fees which accrue on a forfeiture against a defaulting juror, witness or bail must be taxed as costs and collected under execution unless excused therefrom by the county; (b) in all trials in the circuit court, or county court, or court of like jurisdiction—except justice of peace court, and courts in lieu of justice of peace courts whose jurisdiction in criminal cases is limited to the jurisdiction of justice of peace courts, where the state fails to convict, or the indictment abates or is nolle prossed or withdrawn and filed, the fees of the sheriffs and clerks of the court and the state's witnesses shall be paid out of the fine and forfeiture fund, but the sheriffs and clerks must make affidavit before the judge of the court in which the case is tried of the amount due them; (c) fees for services rendered in each criminal case may be taxed against the prosecutor under the provisions of section 337 of title 15 and judgment therefor confessed, and such costs must be collected from such prosecutor and sureties who confess judgment; and if judgment is not confessed therefor, such costs shall be collected upon execution and if execution is returned 'no property found,' such fees of the sheriffs, clerks of court and state's witnesses for services shall be proper claims against the fine and forfeiture fund of the county when evidenced as required by law; (d) in all cases in which the defendant is convicted for a felony, fees for services rendered must be taxed and judgment rendered against the defendant therefor and paid by the state to the extent as provided by law, and all other fees of sheriffs, clerks of court and state's witnesses not paid by the state shall be claims against the fine and forfeiture fund in the event an execution against the defendant is returned 'no property found' and such claims are evidenced as required by law; (e) if the defendant is convicted of a

misdemeanor and sentenced to hard labor for fine and costs, or either, the fees for services under this article shall be paid by the state to the extent as now provided by law, and no execution shall issue against the defendant, and the sentence for fine and costs, or either, shall have the effect of a return of the execution 'no property found,' and all such unpaid fees of the sheriff, clerks of court and state's witnesses shall be claims against the fine and forfeiture fund when evidenced as required by law; (f) if the defendant is convicted of a misdemeanor and confesses judgment for the fine and costs and fees for services under this article shall be collected by execution against the defendant and his sureties; (g) in all cases enumerated in this section the payment of sheriffs and clerks fees shall be postponed to the rights of the state's witnesses."

Therefore, if the convict department does not or cannot pay certain items of court cost under those enumerated in Title 45, Section 69, Code of Alabama 1940, and execution is issued against the defendant and returned "no property found," the costs may then become a claim against the fine and forfeiture fund of the county.

If the defendant in a criminal case is sentenced to hard labor and costs (misdemeanor), but is delivered to the Department of Corrections and Institutions by the county the costs are paid out of the Convict Fund for those enumerated items in Title 45, Section 69, Code of Alabama 1940. See Title 45, Section 96, Code of Alabama 1940.

Those items of cost not paid for by the State (Convict Fund) under the provisions of Title 45, Section 69, Code of Alabama 1940, are claims against the fine and forfeiture fund of the county. In hard labor cases, no execution need issue against the defendant and be returned "nulla bona" before claims may be made upon the fine and forfeiture fund. See Title 11, Section 83, Code of Alabama 1940.

We trust this answers your inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 16, 1948.

Honorable A. B. Jefferies, President,
Board of Revenue and Road Commissioners,
Mobile County,
Mobile, Alabama.

Counties—Mobile County.

1. Purchase of voting machines on credit, when total purchase price, including interest, is within constitutional debt limit, is valid. (Title 17, Sections 91-119, Code of Alabama 1940; Title 12, Section 78, Code of Alabama 1940; Title 12, Sections

124-128, Code of Alabama 1940; Amendment 29 to the Constitution of Alabama; Act No. 328, Regular Session of the Legislature 1939, page 216.

2. Counties having power to incur debts can contract to pay interest thereon.

3. Under contracts for voting machines, where purchase price is payable in ten annual installments, claim for each installment, as it matures, must be filed, ordered, allowed, and approved under Title 12, Chapter 8, Code of Alabama 1940.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of August 17, 1948, is as follows:

"Mobile County contemplates purchasing fifty voting machines for use at elections to be held in the county, the total purchase price being \$69,800. The county does not now have funds available for payment of the purchase price in full and has arranged with the seller that in lieu of the county paying for the voting machines in cash, the seller will enter into a contract with the county whereunder it will sell to the county, and the county will purchase from the seller, the said machines at the aforesaid purchase price which shall be payable in ten equal annual installments of \$6,980.00, with interest at the rate of 3% per annum being payable annually on the balance of the purchase price remaining unpaid at the maturity of each installment. The total purchase price of the machines, including the interest thereon, will be within the constitutional debt limit of the county. The question has arisen as to whether the county can lawfully agree to make such interest payments.

"Your official opinion is respectfully requested on the following questions:

"(1) Can Mobile County lawfully contract for the purchase of such voting machines and agree in such contract to pay the purchase price thereof in annual installments over a period of 10 years with interest on the unpaid balance of the purchase price being payable annually at the rate of 3% per annum?

"(2) If your answer to the foregoing question is in the affirmative, can the county lawfully pay the interest so contracted for pursuant to the provisions of such contract?

"(3) If you answer the foregoing questions in the affirmative, can the county treasurer lawfully pay the annual installments of principal and interest as provided in the contract without the necessity of the holder of the contract filing each year a duly verified

claim for the principal and interest maturing that year to be ordered, allowed and approved by the governing body of the county, or will it be necessary that such claim be filed with and ordered, allowed and approved each year by the governing body of the county?"

The answer to your first question is in the affirmative. (See Title 17, Chapter 1, Article 7, Sections 91-119, Code of Alabama 1940.) The Alabama Code of 1940 confers very broad powers on the several county governing bodies of Alabama for the purchase of voting machines. In 1939, the Legislature of Alabama passed an Act (Act No. 328, Regular Session 1939, page 216) authorizing the governing body of Mobile County to exercise the powers granted by Article 7, without first submitting to the electorate of that county the question, whether or not voting machines shall be used therein.

Since the governing body of Mobile County has the power to purchase voting machines, it may purchase such machines on credit, thus incurring a debt, so long as the debt is within the constitutional debt limitation. *Allen v. Intendant and Councilmen of LaFayette*, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497,—this case was decided in 1889; *Herbert v. Perry*, 235 Ala. 71, 177 So. 561,—this case was decided in 1937.

The contract set forth or outlined in your letter is not a "warrant or order for the payment of money," within the meaning of Section 78 of Title 12, Code of Alabama 1940, and such a contract is not, therefore, violative of the county financial control act. A contract to purchase equipment which the county is specifically authorized to purchase, such as voting machines, is no more a warrant or order for the payment of money than a contract entered into by the county to construct a courthouse or a jail or a road, or to purchase other equipment which it is authorized to purchase. In each case a debt is created (unless, of course, in the contract the existence of a debt is specifically negative and the obligation is made payable out of a limited source, such as proceeds from the State gasoline tax). However, a warrant or order for the payment of the debt cannot be issued until a verified claim for the debt is properly filed with, audited by, allowed, and approved by, the county governing body, and also until funds for the payment of the claim are in hand. The fact that money is not on hand to pay the debt does not prevent the creation thereof.

The purchase of property on credit does not constitute the borrowing of money, and is not, therefore, subject to the provisions of Title 12 of the Code of Alabama 1940. (Title 12, Sections 124-128.)

Amendment 29 (Mobile County Bonds) of the Constitution of Alabama is not violated by the proposed contract.

It may be pointed out that each of the annual installments provided for in said contract should be included in the expenses of the county for each fiscal year, at the time the budget is adopted by the county

governing body of Mobile County, at the beginning of each fiscal year (September).

My answer to your second question is also in the affirmative. The Supreme Court of Alabama has held many times that counties and municipalities having power to incur debts, can contract to pay interest on such debts, even though specific statutory authority for the payment of interest is not granted. See *Alabama City G. & A. Ry. Co. v. Gadsden*, 185 Ala. 263, 268, 64 So. 91,—decided in 1913; *Talley v. Commissioner's Court of Jackson County*, 175 Ala. 644, 39 So. 167 (see page 648),—decided in 1905; *Littlejohn v. Littlejohn*, 195 Ala. 614, 71 So. 448 (see page 617),—decided in 1916; *Board of Revenue of Covington County v. Merrill*, 193 Ala. 521, 539, 69 So. 971,—decided in 1915; *Town of Eutaw v. Coleman*, 189 Ala. 164, 177, 66 So. 646,—decided in 1914; *Herbert v. Perry*, 235 Ala. 71, 72, 177 So. 561,—decided in 1937.

In answer to your third question, in my judgment, it will be necessary for the holder of the said contract to file each year a duly verified claim for the principal and interest maturing in that year and for such claim to be filed, ordered, allowed, and approved each year, in accordance with the provisions of Chapter 8 of Title 12, of the Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 16, 1948.

Hon. Phillip J. Hamm,
Commissioner of Revenue,
State Department of Revenue,
CAPITOL.

Taxation—Refund—Income Tax—Department of Revenue—
Legal Counsel.

1. Prior to time for filing income tax return a taxpayer may elect the basis upon which he desires to file his income tax return. However, subsequent to such date a taxpayer may not amend such return so as to change the type of return as originally filed.

2. Legal counsel and assistant legal counsel of the department of revenue are Assistant Attorneys General; their opinions to the department of revenue are in no sense opinions of the Attorney General and do not have the force and effect of opinions of the Attorney General, unless submitted to and approved by the Attorney General. Title 51, Section 123, Code of Alabama 1940.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of August 19, 1948, is as follows:

"Enclosed herewith is a copy of a written opinion rendered by Mr. H. Grady Tiller, as Counsel for the Department of Revenue, relative to the application of Mr. David E. Dunn for a refund of income taxes in the amount of \$332.51, exclusive of interest, for the calendar year 1947.

"As you will observe, Mr. Tiller has ruled that the Commissioner of Revenue is not authorized to approve for payment this petition for refund.

"Because of the importance of the legal question involved in this petition, I am respectfully requesting under the provisions of Title 51, Section 123, Code of Alabama 1940, a ruling from you as Attorney General as to whether the written opinion of Mr. Tiller has the force and effect of an official opinion of the Attorney General.

"The above-mentioned section provides that opinions rendered by the counsel of the Department of Revenue shall not have the force and effect of official opinions of the Attorney General unless approved by the Attorney General. I am therefore respectfully submitting Mr. Tiller's opinion to you for a ruling thereon.

"Since Mr. Tiller's opinion sets forth sufficiently the facts of the petition for refund, I am not forwarding to you Mr. Dunn's petition."

We are herein concerned with the propriety of the claim for refund of income taxes paid by the taxpayer for the calendar year 1947. A brief review of the facts upon which the said claim for refund is based reveals the following: That the taxpayer, on February 26, 1948, did file with the department of revenue an income tax return for the calendar year 1947; said return reflecting income tax due by said taxpayer to the State in the amount of \$332.51, which amount was paid upon the filing of the return. An examination of said return further reveals, (1) that the return was filed in the name of one David E. Dunn, 117 Arlington Road, Montgomery, Alabama; (2) that no answer was filed to the questions therein presented on line 2 of said return which reads as follows: "2. If married, did your wife (or husband) earn a separate income?_____. Has same been included herein?_____. If not, state name under which separate return was filed_____." (3) that the return included the income and deductions only of David E. Dunn, and not that of any other person or persons; (4) that the return was signed only by David E. Dunn in that section of the return which

requires the signatures of the taxpayers, and which reads as follows:

(Signature of taxpayer)	(Date)
”	
(If this is a joint return of husband and wife, it must be signed by both)	

Now, on June 23, 1948, said David E. Dunn, being joined by his wife, Sallie H. Dunn, filed a purported amended joint return which reveals the following: (1) the return was filed in the name of David E. and Sallie H. Dunn of 117 Arlington Road, Montgomery, Alabama; (2) line 2 of said return was completed and reads as follows: “2. If married, did your wife (or husband) earn a separate income? —Yes—. Has same been included herein? —Yes—. If not, state name under which separate return was filed_____.” (3) said return included a loss on sale of stock by the said Sallie H. Dunn, and the income and deductions of David E. Dunn; (4) said joint return, instead of showing an income tax liability, shows no tax due by either the husband or the wife; (5) said return was signed by both David E. Dunn and Sallie H. Dunn.

Then, on the 23rd day of June, 1948, David E. Dunn and Sallie H. Dunn duly filed with the department of revenue an application for refund of income tax based upon the said amended return filed on June 23, 1948, which included a deductible loss by Sallie H. Dunn. Thus, we are now confronted with the question raised in your request for an official opinion as to whether you, as Commissioner of Revenue, are authorized to approve for payment the said application for refund of income taxes as filed by the said taxpayer.

Title 51, Section 394, Code of Alabama 1940, as amended by Act No. 75, General Acts 1945, page 72, is the only section under the Alabama law which refers to a joint return. This section provides as follows:

“§394. Individual taxpayer's returns.—Every taxpayer having a net income for the taxable year of fifteen hundred dollars or over, if single, or if married and not living with husband and wife, and of three thousand dollars (if married and living with husband or wife), shall each year make to the department of revenue a return stating specifically the items of his gross income and the deductions and credits allowed by this chapter, his place of residence and post office address. If a husband and wife living together have an aggregate gross income of three thousand dollars or over, each shall make a return unless the income of each is included in a single joint return. If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. A taxpayer other than a resident shall not be entitled to the deductions authorized by section 386 of this title unless he shall make a complete return of his gross income both within and without the state. Every income tax return shall show thereon, in space provided, the name and address of the per-

son who prepared such return. The taxpayer shall be held liable for any statement made by his agent with reference to any information required by law to be furnished in connection with his tax return. Returns made on the basis of the calendar year shall be made on or before the fifteenth day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the fifteenth day of the third month following the close of the fiscal year. The department may grant a reasonable extension of time for filing returns, under such rules and regulations as it shall prescribe. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months. The return must be subscribed by the person who makes it; and must contain a printed declaration that it is made under the penalties of perjury. Every individual who wilfully makes and subscribes a return which he does not believe to be true and correct as to every material particular shall be guilty of perjury, and, upon conviction thereof, shall be imprisoned in the penitentiary for not less than one, nor more than five years." (Emphasis added.)

Thus, it appears that the above-quoted code section gives to a husband and wife an election to make either an individual income tax return or, where their aggregate gross income is \$3,000 or over, to make a single joint return. However, under the plainest language possible of said section, such returns, whether they be individual returns or joint returns, must be made on or before March 15, if made on the basis of a calendar year, and on or before the fifteenth day of the third month following the close of the fiscal year, when made on the basis of a fiscal year.

Title 51, Section 407, Code of Alabama 1940, casts upon the department of revenue the duty of prescribing the forms to be used by a taxpayer in filing an income tax return. The pertinent provisions of this section read as follows:

"§ 407. The income tax provided for in this chapter shall be assessed and fixed as hereinafter provided by the department of revenue and upon blanks in the form prescribed by the department of revenue. * * * * *

In accordance with this statutory provision, the department of revenue has prescribed the form to be used in preparing income tax returns. These returns read in part as follows:

“ _____
(Name)

(Street and number, or rural route)

(Post Office) (County) (State)

OCCUPATION_____

Is this Return filed on Cash_____or Accrual_____Basis?

1. Were you a resident of Alabama on Jan. 1, 1947?_____

If not, state when you became a resident_____

2. If married, did your wife (or husband) earn a separate income?_____. Has same been included herein?_____

If not, state name under which separate return was filed_____

* * * * *

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of taxpayer)_____
Date

(If this is a joint return of husband and wife, it must be signed by both.)"

Since there are no Alabama cases construing these Code sections in regard to the instant question as presented in your request, we must, therefore, look to the interpretations of the Federal Courts in construing the Federal Income Tax Law. The Internal Revenue provision on this question is practically identical with the laws of the State of Alabama as hereinabove set out. Section 51 of the Internal Revenue Code (1947) reads in part as follows:

"§ 51. **Individual Returns.** (a) Requirement.—Every individual having for the taxable year a gross income of \$500 or more shall make a return, which shall contain or be verified by a written declaration that it is made under the penalties of perjury. Such return shall set forth in such cases, and to such extent, and in such detail, as the Commissioner with the approval of the Secretary may by regulations prescribe the items of gross income and the deductions and credits allowed under this chapter and such other information for the purpose of carrying out the provisions of this chapter as may be prescribed by such regulations. (b) Husband and Wife.—A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several. No joint return may be made if either the husband or wife is a nonresident alien or if the husband and wife have different taxable years. The status of individuals as husband and wife shall be determined as of the last day of the taxable year."

Also, the form prescribed for preparing such Federal income tax return is practically identical with the form prescribed by the department of revenue.

It is conceded that under both the Federal law and the laws of Alabama a husband and wife who otherwise so qualify themselves may elect, prior to March 15, to file either a single joint return of their income or separate, individual returns of their respective incomes. However, once such election has been made, such persons are bound by such election unless amended prior to the time for filing returns. See 47 C. J. S., Section 639, page 874; *Rose, Collector of Internal Revenue v. Grant, et al*, 39 F.2, 340, writ of cert. dismissed, 283 U. S. 867; *Sadie Corbett Hayes v. Commissioner*, 6 T. C. 914, aff. 161 F.2 689; *Buttolph v. Comm.*, 29 F.2 695; *Almeda Investment Co. v. McLaughlin*, 28 F.2 81; *Elmwood Corp. v. U. S.*, 107 F.2 111; *Morris v. Commissioners of Internal Revenue*, 40 F.2 504; 80 A. L. R. 378.

In the case of *Rose, Collector of Internal Revenue v. Grant, et al*, supra, this almost identical question was before the court, and the court, by unanimous decision, determined the taxpayer in that particular case could not, after March 15, change from one return to another. The court said:

"The statute gives the right to the husband and wife to file either a separate or a joint return, but not to change from one to the other at any time it appears to their advantage to do so. The impossibility under such a system of determining the amount of the tax due as required by section 250(b) of the Revenue Act of 1921 (42 Stat. 264), as well as the administrative inconvenience thereof, condemns it."

In view of the many court decisions referred to hereinabove which follow the decision of the court in the *Rose Case*, supra, we are constrained to follow such principle of law. Therefore, we must now ascertain if, in the instant case, the taxpayer's original return was an individual return or a joint return. We think that there is no doubt that the purported amended return as filed by the said taxpayer and wife is a joint return. The courts have held that in making such a determination as to the type of return as filed, the taxpayer's intent is the governing factor. That is, the real intent of the taxpayer as disclosed by all the facts in the case should govern in determining whether the return should be treated as a separate return or a joint return. The taxpayer's intent is largely determined by the manner in which he files his return and the answers made to the questions on such returns. See *Kellett et ux*, 5 T. C. 608; *Anderson v. U. S.*, 48 F.2 201; *Aluminum Casting Co. v. Rontzah*, 24 F.2 230, aff. 31 F.2 669, aff. 51 S. Ct. 11, 75 L. Ed. 234; *L. B. Foster v. Commissioner of Internal Revenue*, 26 B. T. A. 1328; *Horsting v. Commissioner of Internal Revenue*, 5 TCM 421; *Kehoe v. Commissioner of Internal Revenue*, 34 BTA 59; *Parent v. Jones*, 392 USTC 9602.

Your attention is further invited to the following excerpt from the recent work on the "Law of Federal Income Taxation" by Mertens, Vol. 8, Section 47.07, where the author, discussing the question herein concerned, said as follows:

"The requirement that both spouses sign a joint return has done much to clear up the difficulty which formerly incumbered the filing of a joint return. Thus, whether a joint return was filed, even though indicated to be such, was frequently adjudged a matter of intent."

The original income tax return as filed by David E. Dunn on the 26th day of February, 1948, was filed in his name only. It was signed only by him, and was not signed by his wife as prescribed for on the form if such was to be a joint return. None of the income or deductions included in the return was that of his wife. Said taxpayer failed to answer the inquiry on line 2 of said return which reads as follows: "2. If married, did your wife (or husband) earn a separate income? _____. Has same been included herein? _____. If not, state name under which separate return was filed. _____."

In view of these facts, I am constrained to hold that said taxpayer's original income tax return was not a joint return of David E. Dunn and Sallie H. Dunn, but is the individual income tax return of David E. Dunn for the calendar year 1947. Your attention is invited to the holding of the Tax Court in the case of *Kellett et ux*, supra, which reads as follows:

"Respondent, in his determination of the deficiency and fraud penalty for 1931, has included the name of Virginia Kellett along with her husband William W. Kellett. He has done this on the theory that the income tax return which William W. Kellett filed for the year 1931 was a joint return filed for himself and his wife, Virginia Kellett. He still insists in his brief that his determination in this respect is correct. However, we think the facts are against him. It is true that on the income tax return filed by W. W. Kellett for 1931 the question, 'Is this a joint return of husband and wife?' is answered 'Yes.' This, of course, is a circumstance to be considered in determining whether or not the return filed was a joint return. But it is only a circumstance. Other facts in the record are to be considered and they seem to show clearly that it was not a joint return. These facts are: The return was made out in the name of W. W. Kellett alone, it was signed by him alone. Nowhere on the return does the name of Virginia Kellett appear. None of her income is included in the return. In fact there is nothing in the record which shows that she had any income for the taxable year. All the income upon which the Commissioner has determined the deficiency and the fraud penalty was the income of William W. Kellett. Therefore, we have found as a fact that the return filed in 1931 in the name of W. W. Kellett was not a joint return of himself and his wife, Virginia Kellett."

In the case of *William F. Horsting v. Commissioner*, supra, the Tax Court followed its ruling in the *Kellett Case* as quoted above. The Court's opinion in the *Horsting Case* reads as follows:

"* * * * The returns were in the name of William Francis Horsting. Underneath his name on the face of the return is printed this instruction '(Use given names of both husband and wife, if this is a joint return.)' Printed below the blank for signatures were the instructions that 'If this is a joint return (not made by agent), it must be signed by both husband and wife.' Petitioner alone signed both returns. * * * *"

"As we have already pointed out, the return here in question both for 1940 and 1941 were signed by petitioner alone. They included only income which petitioner believed to be his own, he having been advised by his counsel and representatives of the Bureau of Internal Revenue that income from the sale of property in Texas could not be returned on a community property basis by a husband and wife living in the State of Illinois. Under these facts and others in the record, if it be assumed that the issue has been properly raised, we hold the return was a separate return and not a joint return. See William W. Kellett, 5 T. C. 608 (Dec. 14, 1912.)"

Since the original return filed by said taxpayer is an individual return, I am of the opinion that subsequent to March 15, 1948, said return cannot be amended by the purported amended joint return filed by the taxpayer on June 23, 1948. Therefore, it is my conclusion that you are not authorized to approve for payment the taxpayer's application for refund which is based upon said taxpayer's purported amended return.

You further ask if a written opinion rendered to you by the legal counsel or other such assistant legal counsel of the department of revenue has the force and effect of an official opinion of this office. I am of the opinion that your inquiry must be answered in the negative. An opinion by the legal counsel or assistant legal counsel of the department of revenue does not have the force and effect of an official opinion of the Attorney General unless submitted to, and approved by the Attorney General. See Title 51, Section 123, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 16, 1948.

Hon. S. Charles Parker,
Chairman, Board of Registrars,
Macon County,
209 South Main Street,
Tuskegee, Alabama.

Boards of Registrars—Registration—Domicile.

1. Domicile of an elector is a mixed question of law and fact, dependent upon the intention and acts of the elector.

2. In order to establish domicile, there must be physical presence coupled with intent, and a domicile once existing continues until a new domicile is established.

3. In the absence of unreasonable selection upon the part of the husband of the place of domicile, mistreatment, abandonment or divorce, the domicile of the wife follows that of the husband, and he, as head of the family, has the right to select the place of domicile.

4. Upon marriage, the intent of the husband as to the place of domicile becomes the intent of the wife, and when such intent is coupled with physical presence in the place of the new domicile, such place becomes the domicile of the wife.

5. In order to register as an elector, an applicant must, assuming his or her place of residence to remain unchanged, have attained by the date of the next general election the requirements of residency prescribed by Section 178, Constitution of Alabama 1901, for voting.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of October 14, 1948, is as follows:

"Is a woman entitled to register in Alabama when she has not resided in Alabama for two years but she has been married to a resident of Alabama for the two years? Does marriage to a resident without residing in the state qualify her to vote within the state?"

In your letter of October 20, 1948, you further advise me that:

"The woman involved resided in Mass. She married a resident of Tuskegee who was temporarily employed in Mass. This was in 1945. He is still temporarily employed in Mass. They have never actually resided in Tuskegee since marriage.

"The question involved is a disputed question. Can she legally register and vote in Tuskegee, Alabama?"

Admittedly, your inquiry is not easy of answer as much confusion exists in our laws relative to the question of domicile. Neither is it possible for me to give you an all inclusive, categorical answer to your inquiry, as each of such questions must be determined in the light of the particular facts applicable thereto, and the proper determination of the question of one's domicile is, to a large extent, dependent upon the intention of the person concerned.

In the case of *Pope v. Howle*, *Allen v. Cooper*, 227 Ala. 154, 149 So. 222, the Supreme Court of this State treated such question and wrote as follows:

"(5, 6) We come now to the paramount and determining question of domicile of the two classes of voters that were here denied the right of franchise. Domicile of the elector is a mixed question of law and fact, dependent upon the intention and acts of the elector. Cases illustrating such fact which may be consulted with profit are: In *Holmes v. Holmes*, 212 Ala. 597, 599, 103 So. 884, 886, the law of domicile is thus stated: 'A domicile once acquired is presumed to continue until a change, *facto et animo*, is shown. *Bragg v. State*, 69 Ala. 204. If there was a change, there must have been both an abandonment of his former domicile with no present intention to return, and the establishment of another place of residence with intention to remain permanently, or, at least, for an unlimited time; the former may be inferred from the latter. *Allgood v. Williams*, 92 Ala. 551, 8 So. 722; *Caldwell v. Pollak*, 91 Ala. 353, 8 So. 546; *Young v. Pollak*, 85 Ala. 439, 5 So. 279; *Merrill v. Norrisett* (76 Ala. 433), *Supra*.'

"See also, *Lucky v. Roberts*, 211 Ala. 578, 100 So. 878; *Talmadge's Adm'r. v. Talmadge*, 66 Ala. 199; *Frederick v. Wilbourne*, 198 Ala. 137, 73 So. 442; *Black v. Pate*, 136 Ala. 601, 607, 34 So. 844; *Griffin v. Wall*, 32 Ala. 149; *Boyd v. Beck*, 29 Ala. 703; *State v. Hallett*, 8 Ala. 159.

"(7.8) The effect of these cases may be thus stated: When the fact of the legal residence of a citizen is once established, such fact of residence is presumed to continue, and this presumption prevails until it is established by the evidence that he has elected to or has established a residence at or in another place. It may further be stated that, while the determination of the place of legal residence of a citizen presents a question of fact, yet, in determining that fact, the intention of the citizen is entitled to and must be given due consideration in connection with his relevant acts. It is this combined result of intention and acts—speaking for the voter of his actual domicile, official residence as a citizen and as an elector, seeking to cast or undertaking to cast his vote—that determines the right to vote in such precinct. * * * *"

Later, in the case of *Ex Parte Bullen*, 236 Ala. 56, 181 So. 498, the Supreme Court had occasion to again consider the question of domicile and there held as follows:

"(4, 5) It is a familiar principle of law as well as political economy, that, residence at a particular place with the intention to remain there for an unlimited time, as a permanent place of abode constitutes domicile. A man can have but one domicile at one and the same time, though he may have numerous places of residence. 'His place of residence may be, and most generally is, his place of domicile,

but it obviously is not by any means necessarily so, for no length of residence without the intention of remaining will constitute domicile.' Webster's New Int. Dict. 659; *Lucky v. Roberts*, 211 Ala. 578, 100 So. 878; *Pope v. Howle*, 227 Ala. 154, 149 So. 222.

"(6) 'Domicile (once existing) continues until a new one is acquired.' *Talmadge's Adm'r. v. Talmadge*, 1880, 66 Ala. 199; *State v. Judge of Ninth Judicial Circuit*, 13 Ala. 805."

From the above, it can be seen that there must be physical presence coupled with intent in order to constitute domicile, and that a person may have but one domicile at one and the same time, though he may have numerous places of residence. Likewise, that domicile once existing continues until a new domicile is established.

According to Blackstone's statement of the Common Law "By marriage the husband and wife are one person," and that person was treated as being the husband. Accordingly, our older cases are to the effect that a woman could not establish a domicile separate and apart from that of her husband. This rule has been relaxed somewhat but it is still the law of this State that the domicile of the husband is the domicile of the wife, and, as head of the family, he has a right to select the place of domicile. The only deviation from such rule would be in the case of an unreasonable selection on the part of the husband, or in those cases in which the wife is forced to live apart from the husband by reason of mistreatment, divorce, abandonment, etc. Under all ordinary circumstances, however, it must be conceded that the domicile of the wife follows the domicile of the husband.

From the information you have furnished me, I must assume that at the date of marriage, and to this date, the husband is a legally qualified elector and domiciliary of Macon County, temporarily residing away from his place of legal residence. As you have correctly cited in your letter, Title 17, Section 17, Code of Alabama 1940, provides that temporary absence shall not cause a forfeiture or loss of domicile, or legal residence.

Applying all of the above rules, statutes, and decisions, to the instant case, it is my judgment that at the time of marriage, in 1945, the wife became invested with the intent to make Macon County her place of legal domicile. In fact, in my judgment, she had no choice in this matter inasmuch as the intent of the husband became that of the wife. However, as I have previously pointed out, in order to establish domicile such intent must coincide with physical presence at the place of the new domicile. Therefore, until such wife was physically present in Macon County, such county did not become her place of domicile. On the other hand, however, it is my judgment that at the first moment such wife appeared in Macon County, irrespective of the duration of her stay, she became a legal domiciliary of Macon County, and from that time on enjoyed the same status as her husband, that of a legal resident of Macon County, Alabama, temporarily residing in the State of Massachusetts. Until such time, however, she was a legal resident of the State

of Massachusetts, for, as I have pointed out, domicile once existing continues until a new one is established.

Turning next to the elements of residency required as a prerequisite to registration and voting within this State, I refer you to Section 178, Constitution of Alabama 1901, which constitutional provision provides, in pertinent part, as follows:

"§ 178. To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year nineteen hundred and one, and for each subsequent year; * * * *"

In the case of *Ex Parte Bullen*, supra, the Supreme Court, in considering this section of our Constitution, wrote as follows:

"(8) This section of the Constitution fixes the essential qualification of an elector in this state, and the requirements that: 'He shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote,' are used in the sense that he must be a domiciliary of the state, county and precinct or ward, at the time he offers to vote, except as provided in that section. (Emphasis supplied.) *Chase v. Miller*, 41 Pa. 403, 404, *McCrary on Elections*, 4th Ed. 73, § 98. * * * *"

It is, therefore, my judgment that if the person here in question, being otherwise qualified as to registration, payment of poll tax, etc., has since the date of first becoming a domiciliary of this State attained the requirements of residency above set out, such person is entitled to participate in elections held within this State.

As regards the registration of such person, I call your attention to Section 181, Constitution of Alabama 1901, as amended by Amendment No. 55, which amendment was proclaimed ratified upon November 14, 1946, and provides, in pertinent part, as follows:

"§ 181. After the first day of January, nineteen hundred and three, the following persons, and no others, who, if their place of residence shall remain unchanged, will have, at the date of the next general election, the qualifications as to residence, prescribed in section 178 of this article, shall be qualified to register, as electors * * * *"

From the above, it will be seen that to entitle one to register such person need not, at that time, have attained the requirements of residency prescribed by Section 187, supra, but rather that such person must, assuming his or her place of residency to remain unchanged, have fulfilled such requirements by the date of the next general election.

Accordingly, if such person, since the date of becoming a domiciliary of the State of Alabama and prior to the next general election, will have satisfied the requirements of residency prescribed by Section 178, *supra*, for voting, and such person is otherwise qualified, then she is entitled to register as a qualified elector of Macon County. I should also here point out that to register, one must appear personally before the Board of Registrars of the county at the time and place prescribed by law.

In the preparation of this reply to your inquiry, I have not overlooked the holding of the Supreme Court in the case of *Wilkerson v. Lee*, 236 Ala. 104, 181 So. 296. The particular rules announced therein stand alone within this and other jurisdictions, but considering and construing such case in the light of other decisions of our courts, I do not deem the opinion announced herein to be in conflict therewith, hence no further reference will be made thereto.

The answer here given to your inquiry is, in a sense, long and tedious, but, as previously stated, proper answer to your question is not without difficulty, being dependent to a great extent upon the particular circumstances surrounding the individual case, and such question does not admit of categorical answer. I have herein attempted to state to you the general rules of law, and cite to you the pertinent decisions of our court, applicable to the question at hand.

This office having previously considered a question similar in nature to that here presented, the reasoning and conclusion of which I deem equally applicable to your inquiry, I therefore, respectfully invite your attention to the opinion found reported in Quarterly Report of Attorney General, Volume 2, page 76.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 16, 1948.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture and Industries,
515 Dexter Avenue,
Montgomery 1, Alabama.

Agriculture and Industries—Records.

1. The certificates which are required by law to accompany the remittance of the inspection fee on kerosene and gasoline paid to the Commissioner of Agriculture and Industries under the provisions of Title 2, Sections 343 and 433, Code of Alabama 1940, do not contain confidential information which the Commissioner and his agents are prohibited from divulging under the provisions of Title 2, Section 18, Code of Alabama 1940.

2. Such certificates are public records on file in the office of the Commissioner of Agriculture and Industries, and under the provisions of Title 41, Section 147, Code of Alabama 1940, upon demand and payment of the legal fees therefor, the Commissioner must furnish certified copies of the same, or certified extracts therefrom containing the information desired, to any party requesting the same.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of October 21, 1948, is as follows:

"This Department has in the past furnished certain petroleum companies with a written list showing the monthly sales of gasoline and kerosene of each company in Alabama, on a per gallon basis, as represented by their monthly payment of inspection fees to this Department.

"The inspection fees to which I refer are levied by Title 2, Sections 343 and 433 of the Code of Alabama of 1940, and are paid to this Department each month by distributors of petroleum products in accordance with these sections of the law. Monthly remittances are accompanied by a sworn statement showing the number of gallons of kerosene and gasoline sold during the month. Pursuant to Title 2, Sections 339 and 430 of the Code of Alabama 1940, officials of my Department make occasional visits to these companies to inspect their records in order to verify the accuracy of monthly remittances and to determine if such records are being kept in accordance with legal requirements.

"I am, herewith, attaching a copy of a list which shows the information which I have been giving to a few of these companies each month, at their request. I shall appreciate it if you will give me your official opinion as to whether I am required to give this information under the requirements of Title 41, Sections 145-147, or whether this practice is forbidden by the provisions of Title 2, Section 18, Code of Alabama, 1940."

Title 2, Section 18, Code of Alabama 1940, which section authorizes the Commissioner of Agriculture and Industries, and his duly appointed agents, to inspect books and records, provides in part as follows:

"If the commissioner, or any member of the board, or any employee or agent, shall divulge any information acquired from the private books, documents, or papers of any person, firm or corporation, while acting, or claiming to act under any authorization or designation in respect to confidential, or private transactions, property or business, of any person, firm, or corporation, except in his

report to the state board of agriculture and industries, or in the report of any agent or employee to the commissioner, or when called upon to testify in any court or proceedings at law, shall be guilty of a misdemeanor, and such employee or agent shall be disqualified from acting in any official capacity in the department."

The inspection fee on kerosene is levied by Title 2, Section 343, Code of Alabama 1940, which section requires that the inspection fee be paid to the Commissioner of Agriculture and Industries on or before the 20th day of each month on kerosene sold or imported into Alabama during the preceding month, and that "each remittance shall be accompanied by a certificate stating that the amount remitted is correct."

Under the provisions of Title 2, Section 339, Code of Alabama 1940, every person, firm, or corporation "selling in or importing into Alabama kerosene" shall keep proper records of such transactions, which records shall be open to inspection by the Commissioner and his agents.

The inspection fee on gasoline is levied by Title 2, Section 433, Code of Alabama 1940, which section is substantially the same as Section 343, *supra*, which levies the inspection fee on kerosene. Title 2, Section 430, Code of Alabama 1940, requiring the keeping of records is substantially the same as Section 339, *supra*.

The information which you have been furnishing to some of the companies each month (as shown by the list attached to your request) is obtained from the certificates which are required to accompany each monthly remittance of the inspection fee on kerosene levied by Section 343, *supra*, and the inspection fee levied on gasoline by Section 433, *supra*. As this information is not obtained by the Commissioner, or his agents, from an inspection of the books and records of the various companies selling kerosene and gasoline, it is my conclusion that it is not confidential information which cannot be divulged by the Commissioner, or his agents, under the provisions of Section 18, *supra*.

The certificates from which the information under consideration is obtained are public records on file in your office, and I find no statute which exempts them from the provisions of Title 41, Sections 145-147, Code of Alabama 1940, which statutes are as follows:

"§ 145. Every citizen entitled to inspect and copy public records.—Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.

"§ 146. Refusal of public officer to permit examination of records.—Any public officer, having charge of any book or record, who shall refuse to allow any person to examine such record free of charge, must, on conviction, be fined not less than fifty dollars.

"§ 147. Public officers bound to give copies.—Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing."

While the section last quoted does not require you to furnish the information here under consideration in the manner in which you have been furnishing the same, Title 2, Section 18, Code of Alabama 1940, does not make the certificates from which the information is taken confidential records. Rather, as above stated, they are public records; and, in my opinion, you should, upon demand and payment of the legal fees therefor, furnish certified copies of such certificates, or pertinent extracts therefrom containing the information desired, to any party requesting the same.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 16, 1948.

Honorable Frank L. Haynes,
Member of the Legislature,
Hodges, Alabama.

Merit System—Legislature—Officers and Offices.

1. There is no constitutional or statutory provision prohibiting a member of the Legislature of Alabama from being employed in the classified service of the State during his term of office.

2. Quarterly Report of Attorney General, Volume 43, page 46, overruled, in part.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of July 5, 1948, is as follows:

"As per our conversation of a few days ago, I am asking an opinion on whether it is possible for a member of the Alabama Legislature to be employed by the State of Alabama under the classified service of the state during his term of office as a member of the Legislature."

If there is any provision of law prohibiting a member of the Legislature of Alabama from being employed in the classified service of the State during his term of office, it must be found in the provisions

of the State Merit System Law (Title 55, Chapter 9, Sections 293-327, Code of Alabama 1940, as amended), since a careful research has not disclosed any other constitutional or statutory provision containing such a prohibition.

If there is any provision of the State Merit System Law which contains such prohibition, it is the following sentence from Title 55, Section 317, *supra*:

"No employee in the classified service shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

It is to be noted that this sentence, among other things, specifically prohibits an employee in the classified service from being "a candidate for nomination or election to any public office, * * * ." However, it does not prohibit an employee in the classified service from holding a public office. If the Legislature had intended to extend this prohibition to the holding of a public office, it would have been a simple matter for it to have done so. However, the fact remains that it did not do so. In this situation, I think the following language used by Mr. Justice Haralson, speaking for the Supreme Court of Alabama, in the case of *The State ex rel Robertson v. McGough*, 118 Ala. 159, 24 So. 395, has application:

"But, there are other rules of interpretation that may override all others, as 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature * * * should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere.'—Cooley on Const. Lim. 69, 70. * * * 'We can only learn what they intended, from what they have said. It is theirs to command, ours to obey. When their language is plain, no discretion is left to us. We have no right to stray into the mazes of conjecture, or to search for imaginary purposes.' *Lehman v. Robinson*, 59 Ala. 241."

I am not unmindful of the fact that the State Personnel Board and the State Director of Personnel, the agency and officer charged with the administration of the State Merit System Law, have construed said law as prohibiting a member of the Legislature from being employed in the classified service of the State during his term of office; nor am I unmindful of the rule that the construction of a statute by those charged with its administration or execution, particularly high administrative or executive officers, is entitled to great consideration. However, this rule applies only in the case of statutes of doubtful meaning.

In this connection, I quote from the opinion of the Court of Appeals of Alabama, by Judge Carr, in the case of **Jefferson County v. Dockerty**, — Ala. App. —, 30 So. 2d. 469; certiorari denied in 249 Ala. 196, 30 So. 2d. 474:

"We are not unmindful of the weight that we should give to 'Administrative Construction.' This rule, however, applies only where the intent and purpose of the statute is to the construing court of doubtful meaning. If the court is clearly of the opinion that the construction given the statute by the officers, who are charged with the duty of its enforcement, is erroneous, there remains no occasion or place for presumptions in favor of the method or manner of this enforcement.

"As the Supreme Court observed in *State et al. v. Tuscaloosa Building & Loan Association*, 230 Ala. 476, 161 So. 530, 534, 99 A. L. R. 1019: 'We have no right, under the guise of construction, to rewrite the law. We can only learn what they (the Legislature, we interpolate) intended, from what they have said. When their language is plain, no discretion is left with us. "We have no right to stray into the mazes of conjecture, or to search for imaginery purposes."'

"To ignore this canon of construction would tend to misplace the responsibility now imposed upon the courts to construe the acts of the lawmaking bodies."

To the same effect are the cases of *Stewart v. Wilson Printing Company*, 210 Ala. 624, 99 So. 92; *Smith v. City Commission of Birmingham*, 236 Ala. 114, 181 So. 122; and *Dixie Coaches v. Ramsden*, 238 Ala. 285, 190 So. 92.

The premises considered, I am constrained to hold that there is no constitutional or statutory provision prohibiting a member of the Legislature of Alabama from being employed in the classified service of the State during his term of office.

However salutary or desirable such a prohibition might be, that is a matter which addresses itself to the Legislature and not to this office.

That portion of the opinion of this office appearing in Quarterly Report of Attorney General, Volume 43, page 46, holding that an employee in the classified service may, under certain circumstances, be a candidate for nomination or election to a public office and retain his position in the classified service, is hereby expressly overruled as being contrary to the plain, clear and unambiguous language of the above quoted sentence of Title 55, Section 317, supra.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

November 17, 1948.

Mr. K. A. Johnson, Superintendent,
Tuscaloosa County Board of Education,
Tuscaloosa, Alabama.

Contracts—County Boards of Education.

Public policy forbids the county board of education to contract with one of its members for the sale of lumber.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of August 4, 1948, is as follows:

"The State Examiners are just finishing checking our books for the fiscal school year, 1946-47. They seem to find everything in good shape except two or three minor matters.

"They asked that I write you and request an opinion regarding the purchase of materials from a company which has as its manager one of the County School Board members. They made reference to an opinion found in the Biennial report of the Attorney General, 1936-1938, Page 723, wherein the State felt that it was against public policy for Board members to have a contract with a Board of Education.

"Our particular case is as follows: In 1946 the County started a building program on force account. We purchased a lot of lumber and other building materials for the construction of many classrooms since that time. When the construction work began, lumber was difficult to obtain. The Board member in question operates one of the leading lumber concerns in this community. We were able to get some sizes and grades of lumber through him that we could not get otherwise that year. Since that time, we have bought lumber from many different concerns including this one that our Board member is manager of. Our construction foreman likes to purchase from him because he claims that he gets better quality and better service than from most of the other concerns. The prices are in line with the others. This Board member has never asked us for the business, in fact, we have asked him several times to help us get the type of lumber that we want.

"I would appreciate your giving me an opinion on this matter, then if it seems that it is not a wise policy to continue in this fashion, we shall, of course, refrain from buying any lumber whatever in the future from this particular concern. If there is no objection to such a procedure, then we would like to continue buying lumber from the place where we can get the best price for the same quality of material."

From the foregoing statement of facts, I assume that the member of the county board of education owns the lumber company from which the board of education purchased lumber. If the member of the board of education in question owns or partially owns said lumber company, it is my opinion that the board should discontinue making the contracts for the sale of lumber described in your inquiry. Quarterly Report of Attorney General, Vol. 43, page 55; Biennial Report of Attorney General, 1936-38, page 723. We enclose copies of these opinions for your information.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 17, 1948.

Hon. J. L. McDonald,
Tax Assessor,
Sumter County,
Livingston, Alabama.

Taxation—Public Utilities—Toll Ferries—Title 51, Section 142, Code of Alabama 1940.

Toll ferries are assessed for taxation purposes as public utility property under Title 51, Section 142, Code of Alabama 1940.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of October 21, 1948, is as follows:

"I have a party by the name of M. D. Barnes, who operates a toll ferry on the Tombigbee river between Sumter and Marengo Counties. Advise me if this should be assessed as his personal property or as public utility."

In answer to your question your attention is invited to Title 51, Section 142, Code of Alabama 1940, which specifically makes it mandatory for all toll ferries to be assessed for taxation purposes as public utilities. This section of the Code is taken from Act No. 194, General Acts 1935, page 256, being Article V, "Public Utilities," Section 105 thereof, and is quoted for your benefit as follows:

"§142. Department of revenue to assess all property.—It shall be the duty of the department of revenue to assess for taxation all property of all railroad companies, street and suburban railroad companies or persons or companies operating railroad or street rail-

roads, or suburban railroads or sleeping cars in this state; all express companies, including railroad companies doing an express business and all telephone and long distance telephone and all telegraph companies, person or persons doing an express, telephone or telegraph business; all person or persons, firms or corporations doing a gas business, transporting gas, or furnishing gas, natural, manufactured or by-product, in or through pipes or in drums, tubes, cylinders or by any other method; all water, electric light or power, hydroelectric power companies, steam heat, refrigerated air, dockage or crantage, toll road, toll ferries, toll bridges, railroad equipment or navigation companies, pipe lines for transporting or furnishing natural, manufactured or by-product gas, water, oil, gasoline or other commodities of commerce and the property of all public service or public utility corporations, and all property not required by law to be listed for taxation with the county tax assessor; and the owner, president, general manager, agent, trustee, receiver or other person or persons having control of the company's affairs in this state shall make returns of all property of said company located in this state to the department of revenue. Provided, that if any sleeping car company shall pay the license or privilege tax of twenty thousand dollars as provided in section 186 of this title, such company shall not be assessed for taxation under this chapter." (Emphasis added.)

It can be seen from the above that the clear expression of the legislature is that toll ferries are classified as public utility property for assessment for taxation purposes.

In so holding, I am not unmindful of the fact that the Alabama Public Service Commission does not have jurisdiction of toll ferries operating on navigable streams and rivers, and to such extent are not considered public utilities within the supervision of said Commission. Title 48, Section 102, Code of Alabama 1940, as amended by Act No. 510, General Acts 1945, page 732. The legislature has, in this latter mentioned Code section, merely exempted such activity from supervision by the Alabama Public Service Commission. This, in my opinion, is a matter of legislative discretion and does not alter my conclusion of the import of Title 51, Section 142, Code of Alabama 1940, *supra*, wherein the legislature has, in clear and unambiguous language, made it the duty of the Department of Revenue to assess toll ferries for taxation purposes as public utility property.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

November 18, 1948.

Honorable H. B. Hamner,
Superintendent of Education,
Russell County,
Phenix City, Alabama.

Schools—Funds—Physical Education.

The district three mill school tax provided for in Title 52, Chapter 10, Article 7 (Sections 254-274), Code of Alabama 1940, may legally be expended for ping pong tables used as part of the equipment of a high school gymnasium in furtherance of the physical education program, recognized and required as part of the curricula of the public schools under Title 52, Chapter 33 (Sections 553-559), Code of Alabama 1940.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of November 4, 1948, is as follows:

"May ping pong tables used as a part of the equipment of a high school gymnasium be legally paid for out of the three mill district school tax of the district in which the gymnasium is located?"

I am of the opinion that your inquiry should be answered in the affirmative.

The district three mill school tax provided for under the provisions of Title 52, Chapter 10, Article 7 (Sections 254-274), Code of Alabama 1940, is levied for public school purposes, and may be used for the benefit of public schools of the districts covered by the levy.—See Title 52, Section 272, *supra*. Under Title 52, Chapter 33 (Sections 553-559), Code of Alabama 1940, the physical education of the students in the public schools of Alabama is a recognized and required part of their curricula.—Biennial Report of Attorney General, 1936-1938, page 3. This office has heretofore held that the cost of athletic equipment to be used in furtherance of the school's physical education program may be paid from the public school funds, which would include the three mill district school tax.—Biennial Report of Attorney General, 1936-1938, page 3, *supra*; Biennial Report of Attorney General, 1936-1938, page 261; Quarterly Report of Attorney General, Volume 19, page 113; cf. Quarterly Report of Attorney General, Volume 51, page 102.

Without determining whether or not ping pong tables would be considered standard equipment of a school gymnasium, I am of the opinion that they would come within the category of athletic equipment for which the public school funds may be expended. Although, strictly speaking, such tables may be considered more in the nature of a social recreational

facility, they are nevertheless of the type and nature as to be classified as athletic equipment used in a less strenuous type of physical training or education.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 22, 1948.

Hon. H. M. Touart,
Tax Assessor,
Mobile County,
Mobile, Alabama.

Taxation—Ad Valorem Taxes.

Real property owned by Cuban consular officials is not exempt from ad valorem taxes by virtue of Article IV of a Convention between the United States and Cuba, Treaty Series 750, proclaimed December 2, 1926.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of October 6, 1948, is as follows:

"I should appreciate your official opinion as to whether or not property purchased and occupied by Senor Amando de Leon, a national of Cuba and a consular officer of that country, who is discharging his official duties in Mobile, is exempt from ad valorem taxes.

"The facts in the case are these: On June 17, 1948, property in the City of Mobile was conveyed to the above Amando de Leon and his wife, Mamie P. de Leon by deed recorded in the Probate Court of Mobile County in deed book 457, n. s. page 164. On the last day of October, 1948, Senor de Leon and his wife were living in a house on the above property and maintaining it as their private residence. Today Senor de Leon appeared in this office and sought to assess the property and claim it as exempt from ad valorem taxation by virtue of Article 6 of a Convention between the United States and Cuba, Treaty Series 750, proclaimed December 2, 1926.

"Article 6 of the above Convention reads as follows:

"Consular officers, including employees in a consulate, nationals of the State by which they are appointed, other than those engaged in private occupations for gain within the State

where they exercise their functions, shall be exempt from all taxes, national, state, provincial and municipal levied upon their persons or upon their property, except taxes levied on account of the possession or ownership of immovable property situated in or income derived from property of any kind situated or belonging within the territories of the State within which they exercise their functions. Consular officers and employees, nationals of the State appointing them, shall be exempt from the payment of taxes on the salary, fees or wages received by them in compensation for their consular services, as well as from every class of requisitions, billettings or services of a military, naval, administrative or police character.

“Lands and buildings situated in the territories of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, national, state, provincial and municipal, other than assessments levied for services or local public improvements by which the premises are benefited.”

“Please advise me as to whether I should exempt from ad valorem taxation the above property of Senor and Senora de Leon.”

In answer to your inquiry, I am of the opinion that the real property of Senor and Senora de Leon described in your letter is not exempt from ad valorem taxes.

The convention or treaty in question is found in United States Statutes at Large, 69th Congress, 1925-27, Vol. 44, Part 3, Page 2471. Notations in the margin opposite Article VI of the above-mentioned convention or treaty refer to paragraph 1 thereof as dealing with “Personal property tax exemption, etc.” of consular officers, and to paragraph 2 thereof as dealing with “Exemption of real property used for governmental purposes.” These notations were no doubt inserted by the research staff which edited the United States Statutes at Large and cannot be authoritatively used as the actual legal interpretation of the convention or treaty in question. They do, however, throw considerable light on the matter.

Paragraph 1 of this article provides that “Consular officers * * * shall be exempt from all taxes * * * levied upon their person or upon their property, except taxes levied on account of the possession or ownership of immovable property * * *”

According to the authorities, “immovable property” is land and that which is attached to the land—real property. See cases collated in Words and Phrases, Permanent Edition, Vol. 20, page 162.

The premises considered, it can be readily seen that paragraph 1 of

Article VI of the above-mentioned convention or treaty does not exempt real property owned by consular officers from ad valorem taxes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 22, 1948.

Hon. J. Fred Gurley,
Tax Collector,
Calhoun County,
Anniston, Alabama.

Schools—Counties—School Districts—Tax Collectors.

Under the Calhoun County Special School Tax Amendment to the Constitution of Alabama, proclaimed ratified January 15, 1948, the question to whom the tax collector disburses funds depends on whether or not the funds have been pledged to secure payment of bonds and interest thereon.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of October 5, 1948, is as follows:

“Re: Alabama General Laws #587 (H. 833 Bennett

Regular Session 1947.

An Act. Passed by the House of Representatives Sept. 9, 1947.
Passed by the Senate Sept. 30, 1947.

“This was submitted to the voters of the many school districts of Calhoun County and carried. The Tax Assessor charged the 5M special school tax and the 3 M tax as district tax. I am collecting the tax. Please give me a ruling on distribution of this tax.

“The districts #1 and #2 comprising the rural districts of the county is in the process of selling bonds. The bill reads to pay the money to Calhoun County if obligated if not to the Board of Education of Calhoun County. Mr. Hunter, president of the First National Bank of Anniston, Alabama, is to be trustee to receive this money from me, and make payments on the bonds. If the governing body of the county by resolution designates Mr. Hunter a trustee, do I pay the money to him?

“2. Anniston, Jacksonville and Piedmont are separate districts. Anniston is in the process of selling bonds pledging this special dis-

trict tax. If pledged to pay for the bonds do I pay the money to the Treasurer of Anniston? If not pledged to the Anniston City School Board?

"The same answer would apply to Jacksonville and Piedmont.

"I am collecting this money and am supposed to make reports distributing it to the proper agencies weekly for the months of October, November and December. Please give me your reply to the above as soon as possible."

In answering your inquiry, it is my opinion the question to whom you should disburse the funds that you have collected from this special tax depends on what has transpired in each particular school district.

You state that Districts 1 and 2, comprising the rural districts of the county, are in the process of selling bonds. If in the process of selling bonds, the special funds have already been pledged to pay the bonds and interest thereon, then you should disburse the funds that you have collected for these districts to Calhoun County. The Calhoun County Special School Tax Amendment to the Constitution of Alabama, proclaimed ratified January 15, 1948, provides, in part, as follows:

" * * * and a special separate election is likewise hereby called in each other school district in Calhoun County on the First Tuesday after sixty days following the date this Constitutional provision becomes effective and the qualified electors of each such other school district in Calhoun County shall vote as to whether said special school tax herein levied shall be effective in their respective districts for a period of thirty years, and where a majority of those voting at said election in any such school district vote in favor of said special school tax such special school tax shall be immediately levied and collected annually thereafter on the first day of October by the Tax Collector of Calhoun County and if pledged, paid to County of Calhoun; otherwise by him immediately paid to the Board of Education of Calhoun County, for a period of thirty years in any such school district where the majority of such electors voting at said election vote therefor. This section shall be self-executing." (Emphasis supplied).

In my opinion, "paid to County of Calhoun," supra, means to the treasurer of the county. As Calhoun County does not have a county treasurer, but has a county depository in lieu of the county treasurer, you should pay the funds to the county depository. I know of no authority for you to pay the funds to an individual as trustee.

If the funds collected by you for Districts 1 and 2 have not been pledged to pay the bonds and interest thereon, then you should pay the funds collected for Districts 1 and 2 to the Board of Education of Calhoun County. See quoted provisions of the Calhoun County Special School Tax Amendment to the Constitution of Alabama, supra.

As to the Anniston, Jacksonville and Piedmont districts, if the districts have pledged the funds, then you should pay the funds collected under the special tax to the city treasurers of Anniston, Jacksonville and Piedmont. If the funds have not been pledged, then you should pay the money collected from this special tax to the Board of Education of the Cities of Jacksonville, Piedmont and Anniston. The Calhoun County Special School Tax Amendment to the Constitution of Alabama, proclaimed ratified January 15, 1948, provides, in part, as follows:

"* * * A special separate election is hereby called on the First Tuesday after sixty days following the date this Constitutional provision becomes effective, in the Cities of Jacksonville, Piedmont and Anniston and in the several school districts of Calhoun County, at which election the qualified voters in the Cities of Jacksonville, Piedmont and Anniston and in the several school districts of Calhoun County may vote as to whether said special school tax herein levied shall be effective for a period of thirty years, and if the majority of those voting at said election vote in favor of said special school tax herein referred to, such school tax shall immediately be levied and collected annually thereafter on the first day of October by the Tax Collector of Calhoun County, and, if pledged, paid to the Cities of Jacksonville, Piedmont and Anniston; otherwise by him immediately paid to the Board of Education of the Cities of Jacksonville, Piedmont and Anniston, * * * " (Emphasis supplied).

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

November 22, 1948.

Hon. Bert E. Thomas,
Director of Conservation,
Department of Conservation,
CAPITOL.

Navigation and Water Courses—Streams—Title 38, Section 107, Code of Alabama 1940.

A fence placed across the Fowl River is an unlawful obstruction of a navigable water course, and a person convicted therefor is subject to a fine of not less than \$100.00 nor more than \$1,000.00 in accordance with the provisions of Title 38, Section 107, Code of Alabama 1940.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of November 1, 1948, is as follows:

"Information has been received by this office that a person who owns property adjacent to Fowl River in Mobile County, Alabama has placed a fence across said stream which prevents boats from going up or down said stream, except to the said fence. It is my further information that this party owns the land on both sides of the river where the said fence has been placed.

"I would like to have your official opinion as to whether or not a person may legally place such an obstruction across a public stream."

My answer is in the negative.

It is well settled law that the ownership of all navigable streams and the beds thereof is vested in the State to be held in trust for the use of the citizens of the State and the United States. The only limitation on ownership and use is that it is subordinate to the supreme right of use by the United States in matters of navigation and commerce. *State, Ex Rel. Attorney General v. The Alabama Power Company*, 176 Ala. 620, 58 So. 462; *City of Mobile v. Eslava*, 9 Port. 577, 33 Am. Dec. 325; *Mobile Transportation Company v. City of Mobile*, 187 U. S. 479, 23 S. Ct. 170.

In Alabama it is the established law that the line of public (State) ownership of the bed and shores of nontidal navigable waterways is the low-water mark. *Webb v. Demopolis*, 95 Ala. 116, 13 So. 289; *Williams v. Glover*, 66 Ala. 189; *Webb v. Demopolis*, 87 Ala. 670, 6 So. 408.

Your attention is further directed to Title 38, Section 107, Code of Alabama 1940, which reads as follows:

"§107. Obstructing navigable watercourses.—Any person who dams up or otherwise obstructs a navigable watercourse, must, on conviction, be fined not less than one hundred nor more than one thousand dollars."

From the above it is concluded that the fence you refer to cannot lawfully be maintained across the Fowl River. The fact that the person erecting this fence owns the property on each side of the river is of no import and, indeed, ownership would vest to such person in the property only to the point of the low-water mark on each side of the river.

In your request you refer to traffic on the Fowl River and the fact that it is a public stream. Therefore, this opinion is predicated on the basis of the river being a navigable stream. As a matter of added information, our Supreme Court of Alabama has held that the test of whether or not a water course is a navigable stream is the capability of its being used for useful purposes of navigation, of trade and travel, in the usual and ordinary modes, and not the extent and manner of use. *Sullivan v. Spotswood*, 82 Ala. 163, 2 So. 716; *Olive v. State*, 86 Ala. 88, 5 So. 653.

Therefore, as a matter of law, it is my opinion that the fence you refer to is an unlawful obstruction of a navigable water course and the person responsible for its erection is subject to a fine of not less than \$100.00 nor more than \$1,000.00, in accordance with Title 38, Section 107, Code of Alabama 1940, supra, and you are so advised.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 23, 1949.

Hon. Roy O. Hill,
Clerk, Circuit Court,
Houston County,
Dothan, Alabama.

Clerks—Executions—Costs and Fees.

1. Execution cannot be issued against a successful plaintiff until execution has been issued against the defendant and returned no property found.

2. A successful plaintiff may postpone indefinitely the issuance of execution against the defendant even though such postponement prevents the return of no property found, and execution issuing against the plaintiff.

3. The right of officers of the court to their fees is incidental to the right of the successful plaintiff to control his judgment and the execution thereof.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 29, 1948, is as follows:

"Title 7, Section 508 provides that an execution must be issued against the unsuccessful party in a suit after ten days and within ninety days from the rendition of such judgment unless otherwise directed by the court or parties or their attorneys.

"Title 7, Section 518 provides that 'When execution against the defendant is returned "No Property Found," execution may issue against the plaintiff - - - for all the costs created by him in obtaining his judgment.'

"Thus, it will be seen that when an attorney of record for a successful plaintiff gives written instructions to the clerk not to issue execution, it is impossible to issue execution against the plaintiff

for his cost because there has been no execution returned 'no property found.'

"It occurs to me that the costs in a case, although rendered to the plaintiff, are really for the use of the officers of the court and I am wondering if an attorney of record as outlined above has authority under the sections mentioned above to hold up execution against defendants for the cost incurred in a case.

"Please give me your opinion, as to whether a clerk, in a case as outlined, can issue execution against the defendant in favor of a successful plaintiff for ONLY the cost in a case, and, if returned 'no property found,' then issue execution against the plaintiff for the costs due by him under the law."

You are advised that the clerk is not authorized to follow the procedure as stated in your inquiry, namely, issuing an execution against the defendant solely for costs after the successful plaintiff or his attorney has directed in writing not to issue execution.

Before execution for costs can issue against a successful plaintiff for costs created by the plaintiff, it is essential and a condition precedent that execution first be issued against the defendant and returned "no property found." Title 7, Section 518, Code of Alabama 1940; Title 11, Section 7, Code of Alabama 1940.

It is within the power of the owner of the judgment, the successful plaintiff or his attorney of record, to direct the clerk to withhold the issuance of a writ of execution. Title 7, Section 508, Code of Alabama 1940. This power of the successful plaintiff includes the power to direct the clerk to withhold execution for judgment and costs. Title 7, Sections 506, 508, Code of Alabama 1940.

The successful plaintiff may postpone indefinitely the issuance of execution against the defendant, and thereby prevent a return of "no property found." Such action on the part of a successful plaintiff may cause inconvenience and delay upon the officers of the court entitled to fees, but such inconvenience and delay is incidental to the right of the successful plaintiff to control his judgment. Quarterly Report of Attorney General, Vol. 25, page 84, 89; Vol. 29, page 78. The opinion cited, Vol. 25, page 84, suggests a remedy for the officer to collect his fees.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

November 23, 1948.

Hon. Edgar Underwood,
Judge of Probate,
Franklin County,
Russellville, Alabama.

Juvenile Courts—State Training School for Girls—Counties.

When girl is committed to State Training School for Girls, county must pay actual expenses of transportation. Title 52, Section 581, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of November 11, 1948, is as follows:

"The Juvenile Court of this county committed two girls to the State Training School for girls in Jefferson County, Alabama and the Sheriff transported the two girls to the industrial school and has applied to the Court of County Revenue for expenses incident to removing said girls from this county to the institution.

"I find that Section 581 of Title 52 of the Code appears to provide for such expenses but does not specify what expenses would be included and how the transportation should be figured.

"The Sheriff thinks the same expenses should be allowed as is provided for transporting insane patients, Acts 1943, page 578."

In my opinion, the sheriff is entitled to claim from the county all actual expenses incident to the removal, but not necessarily ten cents per mile.

Title 52, Section 581, Code of Alabama 1940, provides:

"§ 581. Transportation.—It shall be the duty of each county, when a girl is committed to the state training school for girls from such county, to pay any and all expenses incident to removing such girl from the county to the institution."

I further call to your attention that Title 13, Section 351, Code of Alabama 1940, provides in part as follows:

"§ 351. . . . All expenses necessary or appropriate to the carrying out of the purposes and intent of this chapter and all expenses of maintenance and care of children that may be incurred by order of the court in carrying out the provisions and intent of this chapter, shall be valid charges and preferred claims against the county and shall be paid by the county treasurer when itemized

and sworn to by the creditor or other persons knowing the facts in the case, and approved by the judge."

In my opinion, Section 581, supra, authorizes the county to pay all actual transportation expenses when a girl is removed from the county to the State Training School for Girls. Such expenses, if the removal is made by automobile would include gasoline, oil, depreciation for use of the automobile, and any other expenses incident to the transportation. The expense of the return trip should also be included. It is apparent that such amount would not be a fixed sum per mile as is provided in Act No. 575, General Acts 1943, page 578.

The sheriff should, therefore, present a claim to the county governing body for his actual expenses.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 6, 1948.

Hon. Lecil Gray,
Judge of Probate,
Walker County,
Jasper, Alabama.

Attorneys—Licenses—Veterans—Exemptions.

1. An attorney who meets the qualifications entitling him to a veteran's exemption under the provisions of Act No. 353, General Acts 1945, page 570, as amended by Act No. 698, General Acts 1947, page 535, may claim the exemption against the entire State license (\$25.00) levied on attorneys by Title 51, Section 460, Code of Alabama 1940.

2. An attorney whose property, both real and personal, is valued at \$7,000.00, or more, or whose annual net income is \$3,000.00, or more, who meets the qualifications entitling him to claim a veteran's exemption under Act No. 353, as amended, supra, is entitled to an exemption from the license levied on attorneys by Section 460, supra, to the extent of \$15.00.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of October 27, 1948, is as follows:

"Your attention is invited to an amendment to Sections 1 and 6 of Act 353 approved July 6, 1945 and known as the Veterans License

Exemption Law. Your attention is further invited to Section 460, Title 51, 1940 Code of Alabama—Licenses for Attorneys—wherein it is provided that a license should be levied on the following basis: 'State \$10.00, State Bar \$15.00, Fee 50c.'

"Please advise me whether or not an attorney may apply his exemption to that part of the above license which goes to the State Bar Association. If your answer is in the affirmative, then please advise me whether or not an attorney who owns more than \$7,000.00 worth of property or whose net income exceeds \$3,000.00 per annum is entitled to apply all of the \$15.00 county exemption to the State Bar Association or if he is only allowed to apply that proportion allowed for state exemption, i.e., the \$15.00 allowed for state exemption, or whether or not he is only allowed to apply \$10.00 of his total of \$30.00 state and county exemption to the purchase of the license. In short, what I want to know is whether or not his license will be \$10.50, \$15.50 or 50c."

Title 51, Section 460, Code of Alabama 1940, which levies a license on attorneys, is in part as follows:

"Each attorney engaged in the practice of law shall pay an annual license of twenty-five dollars to the state, but none to the county. * * Fifteen dollars of the license herein levied shall constitute a separate fund to be disbursed by the comptroller on the order of the board of commissioners of the Alabama State Bar. * * *"
(Emphasis supplied.)

In the case of *State v. Wilson*, 27 Ala. App. 560, 176 So. 620, cert. den. 234 Ala. 642, 176 So. 622, the court had under consideration Schedule 10, Section 348, Revenue Act of 1935 (Act No. 194, General Acts 1935, p. 256), which levied a license of \$25.00 on attorneys, and provided that \$10.00 of the license levied therein should remain in the State Treasury for the benefit of the Board of Commissioners of the Alabama State Bar Association. In this case, the appellee, a practicing attorney, had refused to pay the \$25.00 license, although he offered—and made his offer good by a proper tender—to pay \$15.00 plus the issuance fee of \$.50, his contention being "that only \$15.00 was the license fee and \$10.00 was for the benefit of the Board of Commissioners of the Alabama State Bar Association." The court held that the entire \$25.00 was the license fee, and that the Legislature might properly direct that the \$10.00 be paid to the State Bar Association.

In an opinion of this office found in Quarterly Report of Attorney General, Vol. 22, page 138, it was held that the judge of probate was entitled to a commission of two and one-half per cent on the entire \$25.00, thus treating the entire amount of \$25.00 as the license fee. See also Biennial Report of Attorney General, 1934-36, page 406.

It will thus be seen from the *Wilson* case, *supra*, and the opinions referred to that the entire \$25.00 is the license fee.

Under the provisions of Section 2 of Act No. 353, General Acts 1945, page 570, a veteran who meets the requirements set out in Section 1 of said Act, as amended by Act No. 698, General Acts 1947, page 535, is entitled to an exemption from State business and occupational license taxes in the amount of \$35.00, provided, however, if the property of the veteran, both real and personal, is valued at \$7,000.00, or more, or his net annual income is \$3,000.00, or more, he is entitled to an exemption of only \$15.00 from State business or occupational license taxes under the provisions of Section 6 of Act No. 353, supra, as amended by Act No. 698, supra.

Answering your first inquiry, in view of the conclusion that the entire \$25.00 is a license tax or fee, an attorney, who meets the qualifications entitling him to the \$35.00 exemption from State business or occupational license taxes, may claim an exemption against the entire license. The fact that under the provisions of Section 460, supra, \$15.00 of the \$25.00 license fee is placed in a special fund for the benefit of the Alabama State Bar Association has no bearing on the question under consideration.

In answering your second inquiry, I wish to call your attention to the fact that Section 460, supra, which levies a State license of \$25.00 on attorneys specifically provides that there is no license to the county. For this reason, it is not necessary to consider the exemption from county licenses.

In answer to your second inquiry, it is my opinion that if an attorney whose property, both real and personal, is valued at \$7,000.00, or more, or whose net annual income is \$3,000.00, or more, meets the qualifications entitling him to claim an exemption under Act No. 353, as amended, supra, he is entitled to an exemption from the license levied on attorneys at Section 460, supra, to the extent of \$15.00. It, therefore, follows that under such conditions, the amount of the license to be collected is \$10.00 and the \$.50 issuance fee should also be collected as provided by law.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 6, 1948.

Hon. G. A. Mosley,
Sheriff, Montgomery County,
Montgomery, Alabama.

Sheriffs—Writs of Execution.

It is the duty of the sheriff to use due diligence to discover property of the defendant subject to execution.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of November 20, 1948, is as follows:

"Will you be kind enough to advise me whether it is the duty of the Sheriff to look up property of a Defendant in Judgment Executions for the purpose of placing a levy.

"The Sheriff's attorney states that the Plaintiff or his attorney should seek out property, Real or Personal, upon which the Sheriff's office is to place the levy. That it is not the business of this department to take time away from our serving of writs, to seek what property the Defendant has which is leviable.

"Several local attorneys state that it is the Sheriff's duty to seek out property that the Defendant is supposed to have. In as much as I have been swamped for months with the task of hunting said properties to levy upon, thus becoming delinquent with other Writs that need prompt attention, it is impossible to give them the service needed."

In my opinion, it is the duty of the sheriff to use reasonable diligence to "look up," discover, and ascertain property of the defendant subject to levy under a writ of execution.

One of the first duties of the sheriff is "to execute and return the process and orders of the courts of record of this state, and of officers of competent authority, with due diligence, when delivered to him for that purpose, according to law." Title 54, Section 5, Code of Alabama 1940. A writ of execution or fieri facias is an order to the sheriff to levy upon goods and chattels of the defendant in execution. Title 7, Section 506, Code of Alabama 1940. In connection with this writ, Title 7, Section 526, Code of Alabama 1940, provides as follows:

"He must execute the writ with diligence, and if practicable, perform the mandate thereof, and make return of his acts to the clerk or register as soon as practicable and not later than ninety days from the date of the execution."

It is clear, therefore, that the sheriff must use due diligence to execute the writ, and the extent of the diligence required may be different in each case.

In the case of *Newcomb Brothers Wall Paper Co. v. Wiggins*, 201 Ala. 551, 78 So. 905, the language used by Judge Mayfield indicates to me that the sheriff must "look up" or ascertain property subject to execution. In this case, the court said:

"The sheriff is under no duty to make a levy unless the defendant in the writ owns, or at least is in possession of, the property legally subject to be levied on, and which by the exercise of due diligence the sheriff can find. Unless there be property subject to levy, within the reach of the sheriff, and which by the exercise of reasonable diligence he can find, he is guilty of no neglect of duty in not levying."

The case of *Higdon, et al v. Fields*, 16 Ala. App. 182, 76 So. 466, also indicates that the sheriff should investigate and ascertain the property of the defendant which is subject to execution. It is stated in the *Higdon* case, *supra*:

"It is true that Brent, the deputy sheriff, testified that Hinze told him that he had bought the property; but that should not have been the extent of the investigation made by the sheriff in order to diligently execute a writ which had been placed in his hands for execution."

It is further stated in the *Higdon* case:

"It is the duty of a sheriff to execute with diligence all executions which may come into his hands as such sheriff, and to make returns thereon promptly, and the sheriff and his bondsmen are liable for any negligent failure to perform such duty."

See also *The Governor v. Campbell*, 17 Ala. 566, and *Whitsett v. Slater*, 23 Ala. 626.

The general rule requiring the sheriff to discover or "look up" property of the defendant subject to execution is also stated in 57 C. J., *Sheriffs and Constables*, Section 152, page 784:

"Where a sheriff has in his hands a summons to serve or a writ to execute, he must in good faith make all reasonable effort and use due diligence to find defendant, or discover property subject to the writ, and serve or execute such process in the most effective manner, . . ."

You are advised, therefore, that it is the duty of the sheriff to use reasonable diligence to "look up," ascertain, or discover property of the defendant in execution, which property is subject to execution. The extent of the investigation in each case depends on the facts in that particular case.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 6, 1948.

Honorable Herman K. Longshore,
Judge of Probate, Lauderdale County,
Florence, Alabama.

Filing Tax—Deeds.

Deeds from trustees to beneficiaries of trust is subject to deed filing tax under Title 51, Section 618, Code of Alabama 1940.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, bearing date of November 19, 1948, is as follows:

"I am enclosing a copy of a deed that is to be filed for record in my office. I have been unable to determine whether or not there should be a deed tax charged on this instrument.

"Since the party is anxious to file the deed on or before next Wednesday, November 24th, I will appreciate you advising me at the earliest possible date whether or not I should collect a deed tax on this deed based on the value of the property transferred."

The pertinent part of the deed in question is as follows:

"KNOW ALL MEN BY THESE PRESENTS, That whereas, T. M. Rogers departed this life on or about the 6th day of August 1943, leaving certain real properties, including part of the property hereinafter described, to Alberta Mims Rogers and Percy Mims Rogers, as Trustees, with power in said trustees, at the discretion of Alberta Mims Rogers, to make a partial distribution of the principal of said trust at any time after Thomas M. Rogers, Jr., should have obtained the age of twenty-one years, and

"WHEREAS Thomas M. Rogers, Jr., has now obtained the age of twenty-one years, and

"WHEREAS since the death of the said T. M. Rogers the said Alberta Mims Rogers, as executrix of the Estate of T. M. Rogers Deceased, did purchase for and on account of said estate certain real estate, being included in that hereinafter described, which said purchased property is fully described in deed from James L. Brock and wife, Norman B. Brock, to Alberta Mims Rogers, dated November 29, 1943, and filed for record in the Probate Office of Lauderdale County, Alabama, in Deed Book 333, page 139, and

"WHEREAS the said Alberta Mims Rogers has exercised her discretion to make a partial distribution of the principal of the

estate of T. M. Rogers by a conveyance of the hereinafter described real property to the three named beneficiaries under the will of T. M. Rogers.

"NOW, THEREFORE, in order to effect said partial distribution of the estate of T. M. Rogers as authorized under his last will and testament, and in consideration of the joint execution of this conveyance, we, the undersigned Alberta Mims Rogers, a widow, individually, as Executrix of the Estate of T. M. Rogers, and as Co-Trustee under the last will and testament of T. M. Rogers, Percy Mims Rogers, individually and as Co-Trustee under the last Will and Testament of T. M. Rogers and Corrine Acker Rogers, his wife; Thomas M. Rogers, Jr., and Jean Paxton Rogers, his wife, do hereby grant, bargain, sell and convey unto Alberta Mims Rogers, Percy Mims Rogers, and Thomas M. Rogers, Jr., the following described real estate, situate in Lauderdale County, Alabama to-wit:

* * * * *

"* * * * *

"IN WITNESS WHEREOF, we have hereunto set our hands and seals this the 19th day of November 1948.

Alberta Mims Rogers

Alberta Mims Rogers,
Individually, as Executrix of the
Estate of T. M. Rogers, Deceased, and
as Co-Trustee under the last will and
testament of T. M. Rogers.

Percy Mims Rogers

Percy Mims Rogers
Individually, and as Co-Trustee under
the last will and testament of
T. M. Rogers.

Corrine Acker Rogers

Corrine Acker Rogers

Thomas M. Rogers, Jr.

Thomas M. Rogers, Jr.

Jean Paxton Rogers

Jean Paxton Rogers."

It is apparent from the deed that the legal title to the property in question was in the trustees of the estate until the deed in question was executed. The trustees, at the discretion of one of them (Alberta Mims Rogers), could make a partial distribution of the principal of said trust at any time after Thomas M. Rogers, Jr., should have attained the age of twenty-one years. In other words, distribution was within the discretion of Alberta Mims Rogers, and such distribution could be made at any time after Thomas M. Rogers, Jr., attained the age of twenty-one years. It, therefore, appears that legal title to the property in

question would remain in the trustees until Alberta Mims Rogers decided to make a partial distribution thereof. Consequently, the deed in question or a similar one was necessary to pass legal title to the beneficiaries.

Prior to the deed in question, the beneficiaries had merely a right to an accounting and distribution by the trustees of the trust estate—an equitable right. By the deed, legal title has been vested in the beneficiaries. An instrument so operating is subject to the filing tax provided for in Title 51, Section 618, Code of Alabama 1940. *Hawkins v. Pure Oil Co.*, 232 Ala. 660, 169 So. 307; Quarterly Report Attorney General, Volume 1, page 117; Quarterly Report of Attorney General, Volume 35, page 100.

Although the consideration in this deed is "the joint execution of this conveyance," and nothing more, such an instrument does not come within the exception in Section 618, *supra*, which provides as follows:

"* * * except * * * deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate.
* * * *"

A somewhat similar situation was commented on in the case of *Hawkins v. Pure Oil Co.*, *supra*, in which Mr. Justice Gardner, at page 308, made the following statement:

"Petitioner argues, therefore, that as it already had the legal title, the deed tendered for record was based upon a mere nominal consideration, and for the perfection of its title, within the language of the exception contained in Section 21½, which, so far as here pertinent reads: 'Except * * * deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate.'

"If, of course, the deed is for the purpose of acquiring the title, even though on a nominal consideration, the exception would not be applicable, as illustrated in the opinion of the Attorney General referring to a deed executed by an executor to carry out the will of the testator and by which deed the legal title passes to the devisee. See Biennial Report of Attorney General, 1926-28, p. 42."

See Quarterly Report of Attorney General, Volume 6, page 106; Volume 8, page 132; Volume 16, page 251.

It is, therefore, my opinion that the deed in question is subject to the tax provided for in Section 618, *supra*, the amount of said tax to be based on the value of the property transferred.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 7, 1948.

Hon. Henry W. Sweet, Director,
Alabama State Docks and Terminals,
Mobile 4, Alabama.

Docks Commission—Labor—Contracts—Salaries.

Under the facts stated, the Department of State Docks and Terminals has authority to pay in full the difference between the wages paid and the actual wages due as determined by a process of bargaining between labor and management.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of November 4, 1948, is as follows:

"Under the provisions of Section 17, Title 38, of the Code of Alabama of 1940, the Department of State Docks and Terminals is given authority to make agreements as to scale of wages, seniority and working conditions with certain employees of the Terminal Railway, to-wit, locomotive engineers, locomotive firemen, switchmen and switch engine foremen and hostlers, in accordance with the Act of Congress known as the Railway Labor Act as amended. The third sentence of said Section 17 is in the following language:

"And should the said department exercise the authority herein given then in such event it shall be the duty of the said department to make such agreements with said employees hereinabove specified, in accordance with the act of congress known as the Railway Labor Act (U.S.C. title 45, sections 151-163) as amended or as hereafter amended to the end that the same agreements as to seniority and working conditions will obtain as to said employees and the standard rate of pay be provided, as are in force relative to like employees of interstate railroads operating in the same territory with terminal railroads authorized hereby."

"Pursuant to the authority of said Section 17, as the same was amended in and by the General Acts of Alabama of 1935, Page 821, the State Docks Commission entered into a written contract, effective January 1, 1936, with the duly authorized representatives of the employee enginemen and yardmen of the Terminal Railway, the classification of employees designated in said Section 17, as amended, a copy of which said agreement is hereto attached and marked Exhibit 'A'.

"The State Docks Commission was replaced as the operating head of the State Docks and Terminals by the Director of the De-

partment of State Docks and Terminals under the provisions of General Acts of Alabama, 1939, Page 7, which said act is codified in the Code of Alabama, 1940, as Section 2, Title 38.

"Your attention is directed to Article XIV, the terminating clause, of said agreement with the representatives of the enginemen and the yardmen, which is in the following language:

"The Articles enumerated in the foregoing constitute an Agreement between the Management, Alabama State Docks, and its Enginemen and Yardmen, the latter represented by a Committee of its own selection, and shall continue in effect through December 31, 1936, and thereafter, or until thirty (30) days written notice shall have been given by either of the parties hereto, setting forth the changes that are desired, to terminate or change in part thereof."

"From time to time after January 1, 1936, the said agreement was amended in part, and particularly with respect to the provisions of Article I thereof relating to rates of pay, said amendments having been effected after thirty days notice as provided by Article XIV and as provided in and by the terms and provisions of the Railway Labor Act, as amended.

"On September 30, 1947, the representatives of the enginemen and yardmen employees of the Terminal Railway of the Department of State Docks and Terminals delivered to the Director of the Department written notice setting forth a proposed or desired change of said agreement, as amended, by further amendment of Article I relating to rates of pay, a true and correct copy of said written notice being hereto attached and marked Exhibit 'B'.

"Answer to said written notice to change the provisions of Article I of the basic agreement was made under date of October 14, 1947 by the Director, a copy of said answer being hereto attached and marked Exhibit 'C'. Pending the results of mediation on a national level, the Terminal Railway personnel involved continued to work and were paid at the pay rate agreed upon in the working agreement effective on and prior to October 31, 1947, pursuant to the provisions of Section 6 of the Railway Labor Act, as amended (Title 45, Section 156, USCA).

"The negotiations on a national level referred to in Exhibit 'B', which were held under the provisions of Section 5 of said Railway Labor Act, as amended, (Title 45, Section 155, USCA) were completed on August 11, 1948, and the Terminal Railway personnel involved are being paid for current work at the increased rate of pay determined in and by said mediation proceedings. The date of the pay increase thereunder and in implementation of the findings of said mediation proceedings is August 16, 1948, with respect to said employees of the Terminal Railway, said date being the first

feasible date on which said order was susceptible of implementation for current work under the system of operation of Department of State Docks and Terminals. However, the question is immediately presented with respect to the amount of the increase for the pertinent personnel for the period between November 1, 1947, and August 15, 1948, both inclusive.

"As Director of Department of State Docks and Terminals, it was my intention and purpose to comply with the provisions of said Section 17, Title 38 of the Code of Alabama of 1940, the basic agreement between the Department of State Docks and Terminals and its pertinent employees, and the provisions of the Railway Labor Act, as amended, with respect to the proposed amendment of Article I of said basic agreement requesting increase in rates of pay. The Department of State Docks and Terminals has fully complied with the findings of said mediation proceedings on and after August 16, 1948, and respectfully request your official opinion in connection with the questions propounded hereinbelow with regard to the amount of the increase for the pertinent personnel for the period between November 1, 1947 and August 15, 1948.

"In forwarding the letter dated October 14, 1947, which is attached hereto and marked Exhibit 'C', it was my purpose and intention to comply with the provisions of the above mentioned laws, with regard to the pay increase for the period between November 1, 1947 and August 15, 1948, both inclusive, to the full extent of my authority as Director of the Department of State Docks and Terminals.

"Under the above and foregoing circumstances, the following questions are presented for your consideration and official opinion:

"1. Does the Department of State Docks and Terminals have legal authority to make payment in full to said employees of the Terminal Railway of the total amount of said pay increase for and during the period from November 1, 1947 to August 15, 1948, both inclusive?

"2. Does the Department of State Docks and Terminals have legal authority to make said payment in full to each of said employees from funds of the Department in the light of Section 68 of the Constitution of the State of Alabama?"

Exhibits "B" and "C," which were attached to your letter of inquiry, are, respectively, as follows:

"BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS
"BROTHERHOOD OF RAILROAD TRAINMEN

"Mobile, Ala., September 30, 1947.

"Mr. Henry W. Sweet, General Manager,
Mr. Henry S. Hill, Director of Personnel,
Mr. C. U. Irvine, Superintendent,
Terminal Railway, Alabama State Docks,
Mobile, Alabama

"Dear Sirs:

"The parties signatories hereto as representatives of the employees engaged in engine and yard service, of the Terminal Railway, A. S. D. under existing agreements between management, and committees of the organizations represented by us, have been authorized, under the laws and rules of procedure of the respective organizations, to submit to you a request for an increase in rates of pay as follows:

"That effective November 1, 1947, all existing basic daily wage rates be increased thirty (30) percent with a minimum money increase of \$3.00 on the basic day. The same percentage of increase applied to the basic day will be applied to all arbitraries, miscellaneous rates, special allowances, and to daily and monthly guarantees."

"Therefore, in accordance with the provisions of the Railway Labor Act and current agreements covering rates of pay, rules, and working conditions of employees represented by the organizations for which the signatories hereto are authorized to act, you will please accept this as formal notice of desire to change the current agreements to the extent indicated in the above quoted proposition.

"This request is being presented on all other railroads on this date, and it is desired that reply to our Proposal be made in writing to the undersigned General Chairmen on or before October 10, 1947, concurring therein, or fixing date within the provisions of the Railway Labor Act, when conference with you may be had for the purpose of discussing this proposal.

"In event settlement is not reached in conference, it is requested that this company join with other companies in authorizing a national conference committee to represent them in dealing with the subject.

"Respectfully submitted,
W. C. Loxley,
General Chairman, B. of L. F. & E.

J. T. O'Rourke,
General Chairman, B. of R. T."

"October 14, 1947.

"Mr. W. C. Loxley, Chairman

B. of L. F. & E.

"Mr. J. T. O'Rourke, Chairman

B. R. T.

"Mobile, Alabama

"Gentlemen:

"Re: Proposed Agreement

"We have received your proposed agreement covering revision in the wage scale and setting up certain allowances and changes in working conditions.

"In view of the fact that this agreement is or will probably be subject to revision in future conference and mediation between the heads of the organization and the representatives of the railroad, it is believed proper at this time to accept your proposal for consideration pending the final agreement reached in conference and mediation.

"Very truly yours,

"Henry W. Sweet,
General Manager."

The answers to your questions depend on the authority given the Department of State Docks and Terminals by the provisions of Title 38, Section 17, Code of Alabama 1940, which reads, in pertinent part, as follows:

"State may acquire, etc., terminal railroads.—* * * * * And the state, acting through the said department, shall have the right and authority to make agreements as to scale of wages, seniority and working conditions with locomotive engineers, locomotive firemen, switchmen and switch engine foremen and hostlers engaged in the operation of the terminal railroads provided for in this section, and the service and equipment pertinent thereto. And should the said department exercise the authority herein given then in such event it shall be the duty of the said department to make such agreements with said employees hereinabove specified, in accordance with the act of congress known as the Railway Labor Act (U. S. C. title 45, sections 151-163) as amended or as hereafter amended to the end that the same agreements as to seniority and working conditions will obtain as to said employees and the standard rate of pay be provided, as are in force relative to like employees of interstate railroads operating in the same territory with terminal railroads authorized hereby. * * * * *

Having elected to deal with the representatives of the employees as authorized in Section 17, supra, the Department of State Docks and

Terminals entered into an agreement effective January 1, 1936, with the Enginemen and Yardmen. Having exercised the authority given it to enter into agreements with its employees, it became "the duty of the said department to make such agreements with said employees hereinabove specified, in accordance with the act of congress known as the Railway Labor Act (U. S. C. title 45, sections 151-163) as amended or as hereafter amended to the end that the same agreements as to seniority and working conditions will obtain as to said employees and the standard rate of pay be provided, as are in force relative to like employees of interstate railroads operating in the same territory with terminal railroads authorized hereby."

It was Article I(a) (Rates of Pay) of the agreement of January 1, 1936, as amended, which the employees sought to change by their letter of September 30, 1947 (Exhibit "B").

Since, by Section 17, *supra*, it was the duty of the representative of the State Docks and Terminals to deal with the employees in accordance with the Railway Labor Act (Title 45, Sections 151-163, U. S. Code), a review of some of the pertinent sections of this Federal statute will be helpful. Section 152 provides, in part, as follows:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operating of any carrier growing out of any dispute between the carrier and the employees thereof."

"Fourth. Employes shall have the right to organize and bargain collectively through representatives of their own choosing.
* * * * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

The act goes on to establish certain machinery for the settlement of disputes and provides further in Section 156 as follows:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the

Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197."

Thus, it is seen that it is the purpose of the Railway Labor Act to provide for prompt and orderly settlement of all disputes concerning rates of pay, rules, or work conditions in order to avoid any interruption to commerce on the operation of any carrier engaged therein. *Virginia Railroad Company v. System Federation No. 40*, 57 S. Ct. 592, 300 U. S. 515, 81 L. Ed. 789.

With the above statutes in mind, both sides entered into negotiations, as outlined in your request, as to the rates of pay which would be effective after November 1, 1947. The question was submitted to the Mediation Board (Title 45, Section 155, U. S. C. A.) for settlement. By the act of negotiating this dispute, both sides agreed that the wage scale from November 1, 1947, would be an amount to be arrived at by the orderly processes of bargaining as outlined in the Railway Labor Act (Title 45, Section 155, U. S. C. A.). The employees, on their part, agreed to continue working at a scale of pay which, unknown to them at the time, was capable of ascertainment by definite methods set forth by law. The employer, on the other hand, was required by law to maintain the then existing pay schedule in lieu of the new schedule which was to be determined (Title 45, Section 156, U. S. C. A., *supra*).

In other words, by mutual agreement between the parties from November 1, 1947, the employees contracted to work for and the employer contracted to pay a certain wage—the exact amount of which was to be determined in the future by the processes set forth by law in the Railway Labor Act. It was further contracted between the parties, as to wages, that both sides would abide by the results of an agreement to be reached on a national level by representatives of the major railroads and national unions. The national agreement was arrived at by mediation and signed on August 11, 1948, in accord with the provisions and help of the Railway Labor Act and its agencies. It provided for pay increases which would be effective as of November 1, 1947.

It was held in *Washington Terminal Company v. Boswell*, 124 F. 2d. 235, 76 U. S. App. D. C. 1, affirmed 63 S. Ct. 1430, 319 U. S. 732, 87 L. Ed. 1694, that the complaining carrier or employee may elect whether to have his grievances or rights determined by a court or settled by administrative remedies prescribed by the Railway Labor Act, but, if the latter remedy is selected, it must be followed through to the conclusion prescribed.

In light of the above, it is my opinion that the payment in full to the employees of an amount equal to the difference between the sum

actually paid them from November 1, 1947, to August 15, 1948, inclusive, and the sum for which they contracted to work from November 1, 1947, and which has now been determined and paid from August 16, 1947, can be made. *McNeil v. People Life Insurance Company*, 43 A. 2d. 293; *McKinley v. Johnstown Traction Company*, 58 Pa. Dist. & Co. 346; *Carder Realty Company v. Perkins*, 261 N. Y. S. 819, 237 App. Div. 152, affirmed 185 N. E. 770, 261 N. Y. 634, motion granted 185 N. E. 805, 261 N. Y. 713.

This payment would not be prohibited by Constitution of Alabama 1901, Section 68, which is as follows:

"The legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee, or allowance to any public officer, servant, or employe, agent or contractor, after service shall have been rendered or contract made, nor to increase or decrease the fees and compensation of such officers during their terms of office; nor shall any officer of the state bind the state to the payment of any sum of money but by authority of law; provided this section shall not apply to allowances made by commissioners' courts or boards of revenue to county officers for ex officio services, nor prevent the legislature from increasing or diminishing at any time the allowance to sheriffs or other officers for feeding, transferring, or guarding prisoners."

The proposed payments are to be made at the rate contracted for from November 1, 1947, and, therefore, no question is presented which involves the payment of extra compensation to employees "after service shall have been rendered or contract made."

Therefore, my answers to both of your questions are in the affirmative.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 7, 1948.

Hon. Ira C. Ballard, Sheriff,
Etowah County,
Gadsden, Alabama.

Costs and Fees—Sheriffs—Etowah County.

Act No. 575, General Acts 1943, page 578; Act No. 318, Local Acts 1947, page 232.

1. The Sheriff of Etowah County, being compensated for his services upon a salary basis, is not entitled to retain, as part of his remuneration, the arrest fee accruing to such officer

for taking into custody persons charged with being of unsound mind.

2. The \$5.00 fee authorized by Act No. 575, General Acts 1943, page 578, for arresting and taking into custody persons charged with being of unsound mind is a part of the system of fees fixed by law as compensation for the sheriff's official services, and is not a reward designed to spur individual initiative and diligence upon his part.

3. All such monies so collected by such sheriff must be paid into the county treasury of Etowah County.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of October 16, 1948, is as follows:

"On October 9, 1947, you rendered an opinion to the Honorable Ralph P. Eagerton, Chief Examiner of Public Accounts, holding that a sheriff is entitled to ten cents per mile per person in removing Insane Persons to a State Hospital.

"The Attorney General sent the undersigned a copy of that opinion as applying to this office. The date of the original request from Hon. Ralph P. Eagerton, to the Attorney General of Alabama, was September 5, 1947.

"In the opinion of the Attorney General, the first paragraph section states: The Sheriffs of the several counties of the State of Alabama shall receive for arresting and taking into custody any person charged with being of unsound mind the following fees and mileage; \$5.00 for taking any such person into custody and ten cents per mile in removing any such person to the State Hospital for the Insane.

"The second section states: The fees and mileage provided for in section One hereof shall be paid from the General Fund of the several counties and shall be paid in the same manner and way as other claims against said fund are paid.

"Two State Auditors have just finished checking the books and accounts of this office and they suggested that I get a clarification from the Attorney General as to whether or not the Sheriff of Etowah County could be charged back the \$5.00 arrest fee which the county has been paying the sheriff.

"The Attorney General, in a previous opinion some months ago to the Sheriff of Etowah County advised that even though Etowah

County is on a salary basis that the Sheriff was still entitled to the mileage for transporting insane persons to State Hospitals.

"It is respectfully requested that you furnish me with an official opinion as to whether or not I am entitled to the \$5.00 arrest fee for each insane person."

Your inquiry, in substance, addresses itself to the question of whether you, as Sheriff of Etowah County, are entitled to the fee of \$5.00 authorized by Act No. 575, General Acts 1943, page 578, for arresting and taking into custody persons charged with being of unsound mind.

In my opinion, your inquiry must be answered in the negative.

The pertinent portion of Act No. 575, *supra*, is as follows:

"Section 1. The Sheriffs of the several Counties of the State of Alabama shall receive for arresting and taking into custody any person charged with being of unsound mind the following fees and mileage: \$5.00 for taking any such person into custody, and 10 cents per mile in removing any such person to a State Hospital for the insane; and such Sheriffs shall also receive the same fees for feeding insane prisoners as are allowed by the State for the feeding of other State prisoners."

The intent and effect of the above-quoted provision of Act No. 575, *supra*, is self-evident and needs no clarification. However, in considering the question presented by your inquiry, one must take into account the provisions of Act No. 318, Local Acts 1947, page 232, which act places the Sheriff of Etowah County, Alabama, upon a salary basis and further provides for the payment into the county treasury of Etowah County of all fees, fines, compensation and allowances collected by said officer. The provisions of said act became effective and operative upon proclamation of the Governor of the State of Alabama to the effect that the qualified electors of the State had ratified the proposed constitutional amendment authorizing the Legislature to so place the Sheriff of Etowah County upon a salary basis, which proclamation bears the date of September 11, 1947. The pertinent provisions of said act are as follows:

"Section 1. That the salary or compensation of the sheriff of Etowah County, Alabama, shall be \$5,000.00 per annum and the said \$5,000.00 annual salary shall be paid out of the county treasury of Etowah County, Alabama, in equal monthly installments at the end of each month upon warrants drawn in the same manner as other officers and employees of Etowah County, Alabama.

"Section 2. That when this Act goes into effect said sheriff of Etowah County shall continue to collect all charges, fees, compensation, allowances, and reimbursements heretofore or hereafter authorized to be collected by him, or by any of his deputies or assistants acting under and by virtue of their offices, and shall on the last day of each calendar month pay into the county treasury of Etowah

County, Alabama, all such monies received, or collected, by him, or any of his deputies or assistants, during such month."

It is, therefore, my judgment that since the effective date of Act No. 318, supra, although the sheriff continues to collect the fee here in question, he must, in conformity with the provisions of said act, pay any such sum so collected into the county treasury of Etowah County upon the last day of any month in which collected and is not authorized to retain any such money so collected as compensation for services he may have rendered in the apprehension, arrest or confinement of persons charged with being of unsound mind.

The distinguishing features between the fee here in question and the so-called "informer's fee" in prohibition cases, authorized by Title 29, Section 102, Code of Alabama 1940, and given consideration by the Supreme Court of the State in the cases of *Mosely v. Kennedy*, 245 Ala. 448, 17 So. 2d 536, and *Dallas County v. Kennedy*, 246 Ala. 558, 21 So. 2d 678, lies in the fact that the Supreme Court in the cases above cited held that the reward provided and authorized by Title 29, Section 102, supra, was not intended to be a part of the fees fixed by law as compensation for the sheriff's official services, but rather that the allowance of such reward was intended to "spur individual initiative and diligence" upon the part of the sheriff and, consequently, accrued to the benefit of such sheriff irrespective of the fact that he received his compensation upon a salary basis rather than a fee basis.

Such, in my opinion, is not true of the fee here considered. In my judgment, the \$5.00 fee here under consideration is a part of the fees fixed by law as compensation for the sheriff's official services and are in no sense a reward designed to spur his individual initiative and diligence. It is, therefore, my opinion that you, as Sheriff of Etowah County, are not entitled to retain such fee for your own use but rather must pay any such monies so collected into the county treasury of Etowah County in conformity with the provisions of Act No. 318, supra.

Relative to the former opinions of this office, referred to by you in your request for opinion, I would advise that the holding announced in the opinion to Honorable Ralph P. Eagerton, Chief Examiner of Public Accounts, under date of October 9, 1947, Quarterly Report of Attorney General, Volume 49, page 18, has no application to the Sheriff of Etowah County, Alabama, insofar as the \$5.00 arrest fee is concerned, in view of the holding announced herein. In my judgment, such opinion, as it relates to this particular fee, has application only to those sheriffs of the various counties of the State who are compensated for their official services upon a fee basis.

With respect to that opinion rendered you under date of October 20, 1947, Quarterly Report of Attorney General, Volume 49, page 73, I would advise that I have reviewed such opinion and am still in accord with the holding therein announced to the effect that you are entitled to the compensation provided by law for conveying insane persons to

the State Asylum or other institutions. This, for the simple reason that when so "deputed" by the Judge of Probate under the provisions of Title 45, Section 211, Code of Alabama 1940, to convey such insane persons you act in a private rather than an official capacity and are, therefore, entitled to the compensation allowed by law for such services even though you may be compensated upon a salary basis for those official services rendered by you as Sheriff of Etowah County.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 8, 1948.

Dr. D. G. Gill,
State Health Officer,
State Department of Health,
CAPITOL.

Hospitals — Health and Health Department — State Building
Commission—Funds.

The (State) Building Commission, created by Act No. 128, General Acts 1945, page 116, is authorized to allocate funds in the Building Commission Fund to the State Board of Health for hospital construction purposes as outlined in Act No. 211, General Acts 1945, page 330.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of December 6, 1948, is as follows:

"May the State Building Commission allocate funds to the State Board of Health for hospital construction purposes as outlined in Act No. 211 of the 1945 Legislature (General Acts, 1945, page 330)?"

The "State Building Commission" referred to in your letter of inquiry is the building commission created by Act No. 128, General Acts 1945, page 116. For a general discussion of the power and authority of this building commission, you are referred to Quarterly Report of Attorney General, Vol. 50, page 138.

By Section 4 of Act No. 138, *supra*, there was created a "building commission fund" which, by said act, was placed under the control of, and made subject to allocation by, the commission. By this same section, certain appropriations were made to the Building Commission Fund, and by Act No. 530, General Acts 1947, page 387, certain other funds were transferred to said fund.

The State Department of Finance Survey of Capital Improvement Program, dated May 23, 1945, is incorporated in Act No. 128, supra, as Section 5 thereof. Projects included in said program are T. B. hospitals (regional) and general hospitals.

By Act No. 211, General Acts 1945, page 330, "The State Board of Health is * * * authorized and empowered to acquire, construct, equip, maintain, and operate public hospitals, health centers, and related facilities for the treatment of any type of disease." The term "hospital" as defined in said act includes tuberculosis and general hospitals, as well as many other types.

Section 5 of Act No. 211, supra, provides, in pertinent part, as follows:

"The State Board of Health is (a) hereby designated as the sole and official agency of the State of Alabama to receive and administer any and all funds for the purpose of constructing, equipping, maintaining, and operating public hospitals, health centers, and related facilities appropriated by the United States Government or the State of Alabama, * * *"

Section 14 thereof contains the following sentence: "It is further provided that for purposes of construction funds may be allotted by the State Building Commission."

From the statutory provisions above cited and/or quoted, it clearly appears that the building commission created by Act No. 128, supra, may allocate funds in the Building Commission Fund for hospital construction purposes as outlined in Act No. 211, supra, and that the State Board of Health is the sole and official agency of the State of Alabama to receive and administer such funds.

Inasmuch as no funds have yet been made available for the planning and construction of State-owned and other public and non-profit hospitals in Alabama under the provisions of Act No. 484, General Acts 1947, page 334, no consideration has been given to the provisions of that act in this opinion.

Yours very truly,

• A. A. CARMICHAEL,

Attorney General.

December 9, 1948.

Hon. Shirley Smith, Member,
Court of County Commissioners,
Lawrence County,
Moulton, Alabama.

Counties—Funds.

1. When a special tax has been levied by a county for a special purpose, and the purpose for which the same was levied and collected has been accomplished, or for any other reason the same is no longer required for the purpose for which it was levied, any balance remaining from the proceeds of such special tax should be transferred to the general fund of the county, to be expended for any purpose for which the general fund may be used.

2. Opinion to Honorable Shirley Smith, Member, Court of County Commissioners, Lawrence County, Moulton, Alabama, under date of July 14, 1948, is overruled, withdrawn and held for naught.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of December 8, 1948, is as follows:

"Reference is made to Amendment No. XXX to the Constitution of Alabama 1901, proclaimed ratified January 2, 1936, and to Act No. 461, Local Acts 1935, page 257, whereby the county governing body of Lawrence County was empowered, authorized and directed to order an election to submit to the qualified electors of said county a proposal to authorize said county to issue bonds in a sum not exceeding \$130,000.00 for the purpose of constructing and equipping a courthouse and jail, and to levy and collect, over a period not exceeding twenty-five years, a special tax on all taxable property in said county at a rate not exceeding three mills, to provide a fund for the payment of the principal and interest of said indebtedness.

"An election was duly held in accordance with the Constitutional Amendment and Local Act hereinabove referred to, and the qualified electors of Lawrence County approved the issuance of bonds in the amount of \$130,000.00 for such purpose, and the levying and collecting of a special three mill tax for a period of twenty-five years to provide a fund for the payment of the principal and interest of said indebtedness.

"Subsequently, bonds in the amount of \$130,000.00 were issued by Lawrence County and the special three mill tax authorized was levied.

"The proceeds of the bonds were only sufficient to construct a courthouse, and no jail was constructed.

"Since that time, the jail in Lawrence County has been condemned, and the Circuit Court of Lawrence County, under the provisions of Title 12, Section 90, Code of Alabama 1940, has approved the issuance by Lawrence County of its interest bearing warrants, payable out of the proceeds of the two and one-half mill special tax for public buildings, bridges, or roads authorized by Section 215 of the Constitution of Alabama 1901, in an amount sufficient to construct a new jail. The warrants so authorized to be issued have been issued and sold, and Lawrence County now has sufficient funds from this source with which to construct a new jail, and has advertised for bids for the construction of the same.

"Out of the proceeds of the special three mill tax hereinabove referred to, Lawrence County has either paid the principal and interest on the \$130,000.00 worth of bonds hereinabove referred to, or has purchased, and holds in a special fund for that purpose, United States Government Bonds in a sufficient amount to retire the principal and interest on the same as it becomes due.

"The special three mill tax levy will continue for several more years.

"In view of the above, your opinion is requested as to whether or not the remainder of the proceeds of this special three mill tax may be transferred to the general fund of the county, to be expended for purposes for which the general fund of the county may be used.

"Inasmuch as your official opinion to me under date of July 14, 1948, was in response to a statement of facts which was partly erroneous, it is requested that that opinion be overruled and withdrawn, and that your opinion in answer to this request be substituted therefor."

From a perusal of the Constitutional Amendment and the Local Act cited in your letter of inquiry, it appears that the special three mill tax therein referred to was levied and collected for the purpose of retiring the principal and interest on the \$130,000.00 worth of bonds therein referred to, which said bonds were issued for the purpose of constructing a courthouse and jail in Lawrence County; that a courthouse in Lawrence County has been constructed; that adequate provision, through financing from other sources, has been made for the construction of a jail; and that the \$130,000.00 worth of bonds therein referred to have, in legal effect, been paid and retired out of the proceeds of said special tax. See *Taxpayers and Citizens v. Shelby County, et al*, 246 Ala. 192, 20 So. 2d 36, and Quarterly Report of Attorney General, Volume 49, page 104.

This being true, it appears that the balance remaining from the proceeds of said three mill special tax should be transferred to the general fund of the county, to be expended for any purpose for which the general fund may be used. See Title 51, Sections 228-230, Code of Alabama 1940.

In view of the last paragraph of your request for an opinion, the opinion rendered to you under date of July 14, 1948, is hereby overruled, withdrawn and held for naught.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 9, 1948.

Mr. B. L. Balch,
Superintendent of Education,
Macon County,
Tusekgee, Alabama.

County Boards of Education—Municipalities—Schools.

If the county board of education, in the exercise of its broad discretion in the administration of school affairs of the county, concludes that the laying of a six inch water main by a municipality, rather than the laying of a proposed four inch water main, is necessary to provide adequate fire protection for a county high school building, it may contribute school funds to pay the difference between the actual cost of laying the four inch water main and laying the six inch water main.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of November 29, 1948, is as follows:

"The City Council of Notasulga has under consideration the proposal to lay a water main from the downtown section out the street on which is located the County High School building. The Council proposes to lay a four inch water pipe. The proposed four inch main is entirely too small to provide adequate fire protection at the County High School building. The Council proposed to lay a six inch main provided the Macon County Board of Education would bear the difference in the actual cost of the four inch main and the six inch. About 500 feet of this pipe will be along the street adjacent to the County High School property and the remainder will be along the property of individuals.

"We feel it essential that there be better protection against loss by fire at the County High School but the City Council is not financially in position to finance the difference in the cost. I would appreciate it very much if you would give us an opinion as to the legality of the County Board of Education participating in the laying of this extra size water main."

"The courts have held that a County Board of Education, being a creature of statute, is limited strictly to the powers expressly granted and those necessarily implied; and that before it is warranted in making an expenditure of school funds, it must point to a 'thus saith the law,' which authorizes the same. *Woodruff v. Beeland*, 220 Ala. 652. " Quarterly Report of Attorney General, Vol. 14, page 19.

In an opinion of this office found in Quarterly Report of Attorney General, Vol. 19, page 229, it was held that while a municipal corporation has no authority to levy an assessment against school property for street improvements, the county board of education may legally contribute to the cost of street improvements to the extent that such improvements add to the value of the school property. In this opinion, it was stated:

"* * this office, following the Supreme Court, has held that there appears no reason why the County Board of Education, in the execution of the authority conferred upon it, may not cooperate with a municipality by joining in projects calculated to effect an improvement or benefit to county school property. (See Quarterly Reports of the Attorney General, Vol. 14, p. 19, and Vol. 18, p. 196, and *Town of Eutaw v. Coleman*, 189 Ala. 164, 66 So. 464.)

* * * * *

"In *State v. County Board of Education of Russell County*, 214 Ala. 620, 108 So. 588, it was held that county boards of education have very broad discretion in the administration and supervision of public schools and educational interests of the county. Control over the property of the public schools of the county is vested in the county board of education by Section 95 of the Alabama School Code of 1927 (Title 52, Section 71, Code of Alabama 1940), and by Section 98 of said School Code (Title 51, Section 74, Code of Alabama 1940) it is provided that the county boards of education shall exercise control and supervision of the public school system of the county and shall seek in every way to promote the interests of the schools under its jurisdiction."

In view of the above authorities, it is my opinion that if the County Board of Education of Macon County, in the exercise of its broad discretion in the administration of school affairs of the county, concludes that the laying of a six inch water main by the city of Notasulga, rather than the laying of a proposed four inch water main, is necessary to provide adequate fire protection for the county high school building, it may

contribute school funds to pay the difference between the actual cost of laying the four inch water main and laying the six inch water main.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 9, 1948.

Mrs. Sam High, Chairman,
Board of Registrars,
St. Clair County,
Ashville, Alabama.

Registration—Boards of Registrars.

1. The Board of Registrars of St. Clair County is authorized to hold sessions for the registration of voters for ten working days during the month of January, 1949, upon order requiring same being made by the governing body of such county.

2. In addition thereto, the Board of Registrars shall hold sessions for the registration of voters upon the first and third Mondays of such month in conformity with, and for the purposes stated in, Act No. 346, General Acts 1945, page 563.

Opinion by Assistant Attorney General Hardin.

Dear Madam:

Your request for an official opinion, bearing date of November 16, 1948, is as follows:

"In regard to the meeting dates of the board of registrars in January, Title 17 says the board can hold a ten-day session in January of uneven years where the county commissioners call them in session. Will it be permissible for said board to arrange those days so they will not interfere with the two days (Mondays) in each month? In other words, could we give notice in papers, which is required for this session, of the dates set by board, and such as to still give us our two Mondays—which would give the board 12 days of work in January?

"Thanks for ruling on this."

Answer to your inquiry involves consideration of the provisions of Title 17, Section 27, Code of Alabama 1940, as amended by Act No. 263, General Acts 1943, page 234, and subsequently amended by Act No. 561, General Acts 1943, page 560, together with the provisions of Act No. 346, General Acts 1945, page 563.

Title 17, Section 27, *supra*, as amended, provides, in pertinent part, as follows:

"In addition to the regular registration provided in this article, the courts of county commissioners, boards of revenue, county commissioners, or other courts of like jurisdiction of the several counties may make an order requiring the books of registration to be opened for ten working days during the month of January, 1941, and each two years thereafter, * * *."

The portion of the statute above quoted provides, in substance, that the governing bodies of the several counties of the State, may, in their discretion, enter an order requiring the books of registration to be open for ten working days during the month of January of the odd-numbered years. No more specific date is set, the question as to the actual dates during said month upon which the books shall be opened presumably being left to the good discretion of the Board of Registrars.

Act No. 346, *supra*, provides, relative to registration, as follows:

"Section 1. That all persons in the armed forces of the United States, the Merchant Marine, the Red Cross, and all other affiliated organizations, stationed or serving outside the county of their residence, and all other persons otherwise qualified under the laws of the State of Alabama to register, are authorized to register to vote at any session of the Board of Registrars of the county of their residence and in which they are otherwise qualified to vote.

"Section 2. That the Board of Registrars of every county of the State of Alabama shall be in session at the court house, or one of the court houses, of their county on the first and third Mondays in month for the purpose of registering all persons in the armed forces of the United States, Merchant Marine, Red Cross, and other affiliated organizations, stationed or serving outside the county of their residence, and all other persons otherwise qualified under the laws of the State of Alabama to Register.

"Section 3. This Act shall not modify, change, repeal, or affect any Act, local or special, providing continuous or monthly sessions of the Board of Registrars of any county of this State.

"Section 4. This Act shall become effective immediately upon its passage and approval by the Governor or its otherwise becoming a law."

Considering Section 3 of the above Act, it is my opinion that it was the express intention of the Legislature to effect no change in the provisions of Title 17, Section 27, *supra*, as amended, which provides for a ten-day working period for the Board of Registrars of the county during the month of January of the odd-numbered years upon order directing same being made by the county governing body, but that in addition

thereto, the Legislature intended to provide the additional facilities for registration prescribed by Act No. 346, supra.

Lending further support to such conclusion is the verbiage of the Title of such Act which reads as follows:

"To facilitate the registration to vote of persons in the armed forces of the United States and affiliated organizations and to facilitate the registration of all other persons who are eligible for registration by providing for meetings of the Board of Registrars in every county in this State on the first and third Mondays in each month."

It is, therefore, my opinion that the Board of Registrars of St. Clair County is authorized to hold sessions for the registration of voters for ten working days during the month of January, 1949, upon order directing same being made by the county governing body, and in addition thereto, such Board shall meet upon the first and third Mondays of such month in accordance with, and for the purposes stated within, the provisions of Act No. 346, supra, and that such latter meetings constitute no part of the ten-day working period provided for by Title 17, Section 27, supra, as amended. Cf. Quarterly Report of Attorney General, Volume 50, page 73.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 9, 1948.

Hon. Hunter Phillips,
Judge of Probate,
Choctaw County,
Butler, Alabama.

Judges of Probate—Costs and Fees—Filing Tax.

There is no provision of law authorizing probate judges to collect fee for "filing, indexing and entering" a transfer of conditional sale contract.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of August 28, 1948, is as follows:

"Please give me an official opinion on the following matter.

"Under Title 11, Section 29, Code of 1940, page 277, covering the fees allowed the Judge of Probate, there is a fee of .50 allowed

for each acknowledgment or probate of deed or other conveyance. I understand that I am allowed .50 for taking the acknowledgment on a deed or any other conveyance, but I would like to know if I would not be allowed .50 for filing, indexing and entering a deed or other conveyance on my records in addition to the .15 per 100 words that I am allowed for recording same.

"My reason for asking for an opinion is because several Finance Companies are filing with us transfers of conditional sales contracts in which they pay large amounts of tax but only .30 for recording. They have cut their recording to a minimum. When we receive these contracts in our office it is necessary for us to file same, enter them on our entry book, and then index in the direct and reverse indexes of our records. This is considerable trouble for a fee of .30 but these people are very pecuniary in that they inclose check for the amount of the taxes plus the small amount of recording fee.

"I will appreciate an opinion on this matter at your earliest convenience."

A transfer of a conditional sales contract must be recorded by the probate judge. *Garrison v. Hamlin*, 215 Ala. 39, 109 So. 106. For recording such an instrument, the judge of probate is entitled to fifteen cents for each one hundred words. Title 11, Section 29, Code of Alabama 1940. You inquire whether or not, in addition to such recording fee, you may claim a fee of fifty cents "for filing, indexing and entering" said instrument on your records.

It is the duty of the judge of probate to index all instruments filed for record in his office. Title 13, Section 285, Code of Alabama 1940. Section 285, supra, does not provide for a separate fee to compensate the probate judge for indexing such instrument. See also Title 11, Section 8, Code of Alabama 1940. Neither do I find any provision of law authorizing the probate judge to collect a fee for "filing, indexing and entering" the type of instrument described in your inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 9, 1948.

Hon. B. G. Robison,
Judge of Probate,
Pickens County,
Carrollton, Alabama.

Counties — Pickens County — Constitutionality — Statutes —
Officers and Offices.

1. Act No. 571, Local Acts 1947, page 386, held unconstitutional as violative of Constitution of Alabama 1901, Sections 68, 96, and 281.

2. Under Title 41, Section 58, Code of Alabama 1940, a state or county official is not liable for funds paid out under an act deemed unconstitutional until such act has been declared unconstitutional by the Supreme Court of Alabama.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of November 7, 1948, is as follows:

"During the 1947 session of the Legislature of Alabama, a local law was passed, which is Act No. 571, page 386 of the Local Acts of Alabama, of 1947. You will observe the act attempts to enumerate additional duties to those required of members of the Court of County Commissioners by the General Laws of the State and provides for a straight salary of \$100.00 per month in lieu of the per diem and mileage as provided by the General Laws of the State, under which we were operating prior to October 8, 1947.

"After a careful study of the local Act, in my opinion, it seems to be in direct conflict with Section 96 of the 1901 Constitution of Alabama. I shall be glad to have you give me an official opinion as to the constitutionality of the local act. I shall also be glad to have you advise me, in the event you should hold the Act unconstitutional, if the Members of the Court of County Commissioners, and I, who signed warrants for the salaries of the Members since Act went into effect, are liable for a refund of said salary warrants or the difference between the amount of salary warrants and the per diem and mileage."

It is my opinion that Act No. 571, Local Acts 1947, page 386, to which you refer, is unconstitutional as violative of Constitution of Alabama 1901, Sections 68, 96 and 281.

Constitution of Alabama 1901, Section 68, reads as follows:

"§68. The legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee, or allowance to any public officer, servant, or employe, agent or contractor, after service shall have been rendered or contract made, nor to increase or decrease the fees and compensation of such officers during their terms of office; nor shall any officer of the state bind the state to the payment of any sum of money but by authority of law; provided this section shall not

apply to allowances made by commissioners' courts or boards of revenue to county officers for ex officio services, nor prevent the legislature from increasing or diminishing at any time the allowance to sheriffs or other officers for feeding, transferring, or guarding prisoners."

Constitution of Alabama 1901, Section 96, reads as follows:

"§96. The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

Constitution of Alabama 1901, Section 281, reads as follows:

"§281. The salary, fees, or compensation of any officer holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

The local act referred to purports to place additional duties on the Members of the Court of County Commissioners of Pickens County, and fixes their compensation at \$100.00 per month each, in lieu of all other compensation provided by law. However, I am of the opinion that they are not bona fide additional duties, but that the act is merely a colorable pretext to increase the compensation of the Members of said Court.

Section 1 of the act referred to is quoted as follows:

"Section 1. In addition to all other duties imposed by law, each member of the Court of County Commissioners of Pickens County shall make periodic inspections of all roads and bridges within his district and make a report of his findings in regard thereto at each regular meeting of the Court. Each member shall also keep constantly advised as to the condition of all county roads where the same cross railroads, and he shall see to it that such crossings are kept in good repair and improved. A detailed record shall be made and kept of each inspection performed."

Section 2 of the act fixes the compensation of each member at \$100.00 per month, in lieu of all other compensation provided by law.

In *Carnley v. Moore*, 218 Ala. 274, 118 So. 409, our Supreme Court, under facts peculiarly analogous to the instant case, stated in part as follows:

"The provisions of the act, under which salary, fees or compensation of petitioner is sought to be compelled of payment by mandamus or as a local act, are violative of section 96 of the Constitution denying the right of the Legislature to enact a law not applicable to all the counties of the state, regulating costs and

charges of courts, or fees, commissions, or allowances of public officers, *Birmingham Elec. Co. v. Harry*, 215 Ala. 458, 111 So. 41; *Vaughan, Judge of Probate, v. State ex rel. Barker*, 212 Ala. 461, 103 So. 38, and was an allowance to a public officer within the inhibition of subsection 24 of section 104 of the Constitution, *Brandon v. Askew*, 172 Ala. 160, 54 So. 605; *Osborn v. Henry*, 200 Ala. 353, 76 So. 119, *Jackson, Clerk, v. Sherrod, Dep. Sol.*, 207 Ala. 245, 92 So. 481.

"The claim or compensation sought by the official was likewise offensive to the provisions of sections 68 and 281 of the Constitution, being in the nature of an increase of the county official's compensation during the 'term of his office,' *Stovall v. City of Jasper*, (Ala. Sup.) 118 So. 467; *City of Birmingham v. Hawkins*, 208 Ala. 79, 94 So. 62; *McMurray v. County Board of Education*, 216 Ala. 144, 112 So. 644, and different from that in other counties.

"* * * We are of opinion that the act in question was a mere effort or colorable pretext to increase the compensation of the county commissioners, and not within the decision of *Taylor v. Davis*, 212 Ala. 282, 102 So. 433, 40 A. L. R. 1052. This is more apparent when its provisions, sections 5, 6, and 7, charging such officials of the county with general duties theretofore resting upon them in a due discharge of duty under the general laws, are considered; that is to say, as members of the commissioners' court, such officials were given the general direction and control of the county's property and the exercise of other powers that are or may be given by law, section 6755, Code, such as the power of purchase or condemnation of road building, maintenance, material, etc., section 6757, Code, additional authority as to bridges, maintenance, operation, etc., sections 6759, 6762, Code, and for the establishment, discontinuance, working, and maintenance of public roads, bridges and ferries, article 2, c. 32, § 1347, et seq.; *Hill v. Moody*, 207 Ala. 325, 93 So. 422; *Sims v. Butler County*, 49 Ala. 115. Such were the general duties imposed by law, that he was required, as commissioner, to exercise, and other powers that may be given by law. Section 6755, Code." (First emphasis added.)

Under the authority noted above, it is my opinion that the act referred to is unconstitutional. See also *Quarterly Report of Attorney General*, Vol. 2, pages 70 and 295; *Quarterly Report of Attorney General*, Vol. 3, page 210; *Quarterly Report of Attorney General*, Vol. 35, page 43; *Quarterly Report of Attorney General*, Vol. 51, page 86.

The second portion of your request for an opinion asks whether or not, in event the act is held unconstitutional, the members of the court of county commissioners and you, as probate judge, who signed warrants under the act, are liable for a refund of salary warrants, or the difference between the amount of salary warrants and the per diem and mileage.

Title 41, Section 58, Code of Alabama 1940, reads as follows:

"§58. When any state or county official shall have collected or paid out any money, as fees, salary or compensation for official services rendered under any law of Alabama, general or special, which law, subsequent to such collection or paying out, shall be declared by the supreme court of Alabama to be unconstitutional or void or illegal, such officer shall not be liable, either individually or on his official bond, in any suit brought for the recovery of such money, so collected or paid out, nor shall the person to whom the same shall have been paid, be liable therefor."

Under the authority of the statute noted above, it is my opinion that the second portion of your request for an official opinion should be answered in the negative. For an opinion on point, wherein the same conclusion was reached, you are referred to Quarterly Report of Attorney General, Vol. 35, page 43.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 10, 1948.

Dr. D. G. Gill,
State Health Officer,
Department of Public Health,
CAPITOL.

Health and Health Departments — State — Schools — Municipalities.

1. Food establishments operated on or in property owned by the State, its agencies or subdivisions, or operated by or under the auspices of the State, its agencies or subdivisions, are not exempt from the health regulations duly promulgated by the State Board of Health under the provisions of Title 22, Section 7(6), Code of Alabama 1940.

2. Food regulations of the State Board of Health are applicable to all establishments or plants which deal in meat processing or meat storage.

3. Property owned by the State is not, of itself, exempt from a municipal rat proofing and rat control ordinance, unless it is specifically exempted therein.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of December 7, 1948, is as follows:

"It will be appreciated if your office will give me its opinion on the following:

"1. Can the Food Regulations of the State Board of Health be considered as applicable to school lunchrooms, or cafeterias, as they are organized and operated under the jurisdiction of the local Board of Education? They are not 'private clubs' or 'fraternal organizations' whose use is limited to members as specifically exempted under these regulations.

"2. Can the Food Regulations of the State Board of Health be applied to slaughterhouses, branch plants for meat processing, sausage plants, meat holding depots, wholesale meat plants—in brief all businesses which deal in meat processing or meat storage? Meat is considered to be a food and is in need of strict supervision under the food establishment permit system.

"3. Are State-owned or operated food establishments—such as the three lunchrooms at the State Capitol, Highway Department Building and Memorial Hospital Building—exempt from the application of Food Regulations of the State Board of Health?

"4. Are the Hotel and Hotel Cafe at Kilby Prison—which provide food and shelter for many citizens (not prisoners), including many legislators—exempt from the application of Hotel and Food Establishment Regulations of the State Board of Health?

"5. Is the ABC System in Montgomery, including State Warehouses, State ABC offices and ABC stores, exempt from the rat-proofing and rat control ordinance of the City of Montgomery because they are State owned and operated institutions?

"A copy of the regulation referred to is attached.

"Attention is invited, also, to Subsection 4 of Section 8 and Section 85 (as amended by the 1947 Legislature, General Acts, 1947, page 337) of Title 22 of the Code of Alabama, 1940."

Rules and regulations adopted by the State Health Department under the provisions of Title 22, Section 7(6), Code of Alabama 1940, have the force and effect of law.—*Wheeler v. River Falls Power Company*, 215 Ala. 655, 111 So. 901. See also, *Parke v. Bradley*, 204 Ala. 455, 86 So. 28. Under the forerunner of this provision of law, the State Board of Health duly adopted "Regulations Covering the Manufacture, Preparation, Display

and Service of Food, Confections and Beverages." In said regulation the following definitions were adopted:

"For the purpose of interpreting and enforcing these rules and regulations the following terms are hereby defined:

"(A) Food Establishment—The term 'food establishment' shall be construed to mean any place, structure, premises, vehicle, or vessel, or any part thereof, in which any foods, confections, or beverages intended for human consumption are manufactured or prepared, by any manner or means whatsoever, or in which they are sold, offered or displayed for sale, or served, and shall include establishments in other states the products of which are sold in this State.

"Provided: That this definition shall not be construed to include fraternal or social club houses, attendance at which is limited to club members; carts, vehicles, or vessels from which wrapped, packaged, or bottled foods or beverages are vended only; nor any establishment the operation of which is specifically governed by other rules and regulations of the State Board of Health.

"(B) Food Product—The term 'food product' shall be construed to mean and include any food, confection, or beverage, or any component in the preparation or manufacture thereof, intended for ultimate human consumption, stored, being prepared or manufactured, displayed, sold, or served in a food establishment, as defined herein.

"(C) Health Officer—The term 'health officer' shall be construed to mean the county health officer, representing the county board of health, of the county in which any food establishment is operated, or his authorized representative; and shall jointly mean the State Health Officer, or his authorized representative.

"(D) Person—The term 'person' shall be construed to mean and include individuals, firms, corporations, or associations."

The only food establishments, as above defined, which were exempted are those specifically set forth. Insofar as your inquiries are concerned, the exemptions include only "fraternal or social club houses, attendance at which is limited to club members." These exemptions, in my judgment, do not apply to school lunchrooms or cafeterias. Nor do they apply to the lunchrooms at the State Capitol, or to the Hotel and Hotel Cafe at Kilby Prison. These food establishments are not fraternal or social clubs and their patronage is not limited to club members; and to some extent are open to the general public, or a selected group thereof.

I know of no rule of law, or any logical reason, why food establishments, as above defined, which are either operated on or in property

owned by the State, its agencies or subdivisions, or operated by or under the auspices of the State, its agencies or subdivisions, should be exempt from health regulations duly promulgated. Such food establishments, in my judgment, are amenable to such regulations, and those charged with the operation thereof should be more diligent toward the end that such regulations are enforced. Being of a public nature, such establishments should set an example to the privately owned establishments in the proper enforcement of the health laws of the State, which inure to the benefit of all its citizens.

In view of the foregoing, it follows that your first inquiry should be answered in the affirmative, and that your third and fourth inquiries should be answered in the negative.

Based on the definitions above set out, it is my opinion that your second inquiry should be answered in the affirmative. All of the establishments and plants set forth in this inquiry come within the definition of "a food establishment," and the meat handled by them within the definition of "a food product."

I am unable to definitely answer your fifth inquiry, as I do not have before me a copy of the rat proofing and rat control ordinance of the City of Montgomery, on which the inquiry is predicated. However, I wish to state that, in my judgment, the fact that property is owned by the State of Alabama would not, of itself, exempt said property from such an ordinance unless it is specifically exempted therein. There is no reason why State-owned property should be exempt from the health and quarantine laws of the State itself, or any of its subdivisions, including municipalities.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 10, 1948.

Miss Sarah J. Daye,
Circuit Court Clerk,
Madison County,
Huntsville, Alabama.

Fines—Agricultural Fund—Clerk of Circuit Courts—Solicitor's Fee.

1. Fine assessed for violation of Title 2, Section 486, Code of Alabama 1940, is to be paid into state treasury for use of agricultural fund.

2. For transmitting fines for violation of agricultural laws to state treasury for use of agricultural fund, clerks of circuit court are entitled to five percent commission.

3. Solicitor's fee collected in a misdemeanor case in the circuit court earned by a solicitor who is paid a salary by the state should be paid into the state treasury.

Opinion by Assistant Attorney General Miller.

Dear Madam:

Your request for an official opinion, bearing date of September 24, 1948, is as follows:

"In a case pending in the Circuit Court a defendant was charged with unlawfully selling adulterated food in violation of Article 31, Title 2, Sections 485-489. The defendant entered a plea of guilty and was fined \$10.00. As a part of the costs I collected a \$10.00 Solicitor's fee.

"Title 2, Section 327, provides that any funds or fees collected under this article shall accrue to the agricultural fund and shall be used for the purpose of defraying the expenses of a proper enforcement of the provisions of this article. However, that section is under Article 19. Section 415 of Title 2 provides in part that any person violating any provision of this Article (Article 25) shall be guilty of a misdemeanor, and all funds accruing from the operation of this law, including fines and fees or otherwise, shall be paid into the agricultural fund for expenditure for the purposes as provided for herein.

"Will you please advise me as to whom I am to pay the fine and Solicitor's fee in this case where there has been a plea of guilty under Article 31."

You request my opinion as to what disposition should be made of a fine assessed against a defendant who entered a plea of guilty in a case in the circuit court for violation of Sections 485-489, of Title 2, Code of Alabama 1940. You also ask what disposition should be made of the Solicitor's fee taxed as a part of the court costs.

The facts set forth in your inquiry indicate that the defendant entered a plea of guilty for an offense declared to be unlawful by virtue of Section 486 of Title 2, Code of Alabama 1940, which Section appears in Chapter 1 under Article 31 of that Title of the Code, *supra*. You point out that there are no specific provisions under Article 31, *supra*, for the punishment of this offense and for the disposition of fines collected, while such provisions are found in other articles of Title 2, *supra*.

Your attention is called to Title 2, Sections 12 and 31, *supra*, which read as follows:

"Section 12. Penalties.—Any person violating any provision of this chapter, or the rules and regulations issued thereunder, shall be guilty of a misdemeanor and, upon conviction, unless otherwise provided in this chapter, shall be fined. * * * *"

(Emphasis supplied.)

"Section 31. Agricultural Fund.—Wherever provision is made in this chapter for the collection of any fee or license or the imposition of any fine or penalty for the violation of any provision of this chapter without providing for the disposition of the proceeds derived therefrom, such proceeds shall accrue to the agricultural fund. * * * *"

All such funds shall be paid into the state treasury and be kept intact, liquid and in trust, subject only to the requisitions of the Department of Agriculture and Industries. * * * *"

(Emphasis supplied.)

Both of the above-quoted sections appear under Title 2, Chapter 1 of the Code, *supra*, which statutes apply to the entire chapter unless otherwise specifically provided in such chapter. There is no specific provision for the punishment of the offense declared to be unlawful by Title 2, Section 486, *supra*, which section appears in Chapter 1, Article 31 of said Title, nor is there any provision made for the disposition of fines collected thereunder. You are therefore advised that the fine mentioned in your inquiry should be transmitted by you to the state treasury where same is to be credited to the agricultural fund as defined by Title 2, Section 31, *supra*.

It should also be noted that you are entitled to a commission of five percent provided for in Title 11, Section 22, Code of Alabama 1940, for collecting and transmitting this money to the state treasury. Quarterly Report of Attorney General, Vol. 16, page 195.

With reference to your question as to what disposition should be made of the Solicitor's fee collected, I refer you to Title 13, Section 242, Code of Alabama 1940, which provides:

"Section 242. Fees of salaried solicitors paid into state treasury.—All fees which may be by law taxed as solicitor's fees against defendants on convictions secured by a solicitor who is paid a salary by the state, belong to the state, and, when collected, must be paid into the state treasury."

Since the case referred to in your inquiry was in the circuit court and the solicitor of such court is paid a salary by the State the solicitor's fee collected by you should be paid into the state treasury. Biennial Report of Attorney General, 1936-38, page 135.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 10, 1948.

Hon. Roy E. Blair,
Tax Assessor,
Madison County,
Huntsville, Alabama.

Motor Vehicles—Ad Valorem Tax.

A motor vehicle owned by a county and purchased by a private individual on September 2, 1948, is not subject to ad valorem tax for the tax year 1948.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of October 14, 1948, is as follows:

"Please give me your opinion on the following: Where a vehicle has been owned by the County from October 1, 1947, to September 1, 1948, and of course was not subject to ad valorem tax, and sold this vehicle to a private individual September 2, 1948. When this private individual presents himself to assess the truck on September 2, 1948, to secure a 1948 Tag, does this individual get exempted on ad valorem tax on the vehicle, or should it be assessed for tax for any part of a year?"

The opinion which I heretofore rendered under date of November 2, 1948, on the above request, is laid in error.

I misinterpreted your request and that opinion was based on the construction by me that you had in mind whether or not this person was entitled to any exemption on the purchase of his motor vehicle tag. It now appears that you were inquiring as to whether or not the motor vehicle owned by the county from October 1, 1947, to September 2, 1948, was subject to ad valorem tax for any portion of the year 1948, when such motor vehicle was purchased by a private individual on September 2, 1948.

In answer to your request, you are advised that in my opinion the motor vehicle in question is not subject to ad valorem tax for the tax year 1948. A motor vehicle for any given tax year is either liable for ad valorem tax for the entire year, or it is exempted from such ad valorem tax. In other words, there is no provision of law for the payment of an ad valorem tax on a motor vehicle on a monthly declining basis. This monthly declining basis system only applies to motor vehicle license tags.

The ad valorem tax year begins on October 1, and ends on September 30 following. Any automobile brought into the state after the last

Monday in February, the date upon which the tax assessor completes his assessment, is not subject to ad valorem tax. Quarterly Report of Attorney General, Volume 20, page 252. In my opinion, this same rule would obtain in the case outlined by you, and due to the fact that the purchaser got this car on September 2, 1948, you should mark on your assessment sheet that there was no tax due on this automobile for that year. This for the reason that the motor vehicle was exempted from taxation while it was owned by the county, namely, from October 1, 1947, down to September 1, 1948.

You are, therefore, advised that in order to enable the purchaser to obtain a license tag for the year 1948, you should issue him a certificate that there is no ad valorem tax due on his car for that year.

I ask that the opinion heretofore rendered to you on November 2, 1948, on this subject, be disregarded and this opinion substituted in its place.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 13, 1948.

Hon. Roy E. Blair,
Tax Assessor,
Madison County,
Huntsville, Alabama.

Taxation—Ad Valorem Taxes—Exemptions.

1. Property owned by church but not used for religious purposes not exempt from ad valorem taxation.
2. Vendee in possession of real estate on October 1, under contract of purchase, is owner for tax purposes.
3. Property owned by the Girl Scouts of America, and used for Scout purposes, is exempt from ad valorem taxation.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of November 22, 1948, is as follows:

"Is real property, now owned by a church, acquired prior to October 1, 1947, tax exempt under the following circumstances: The particular property was willed to the First Presbyterian Church, Huntsville, Alabama, with the provision that an income of \$30.00

per month be paid the sister of the person making the will. This property consists of a very large lot, with three houses on it. An income is derived by the church from rental of one of these houses. The other two houses are being sold on contract to the Girl Scouts to be paid for by the Scout organization on a monthly basis, and of course, title will not pass to them until the contract has been paid for in full.

"You are further advised that the Girl Scouts are now in possession of the two houses in question, and are not assessing them. They entered into the contract and went into possession in June 1948, and have used the property for Scout purposes since that date.

"At the present time, no one is assessing the property, and for the tax year 1948, it was not assessed, but exempted."

October first is ordinarily the law date of liability for ad valorem taxes. One who owns real property in this State on October first is liable for ad valorem taxes for the current tax year, even though he might have sold the property subsequent to October first. Quarterly Report of Attorney General, Volum 49, page 133.

From your facts, the Presbyterian Church owned all of this property on October 1, 1947, and it was not being used for religious purposes. It, therefore, follows that this property was not exempt from ad valorem taxes for the tax year 1948.

Our Supreme Court, in construing the provisions of the Constitution and statutes exempting from taxation property used exclusively for religious purposes, held that the use of the property and not the ownership was the criterion in determining the exemption. *State et al v. Church of Advent*, 208 Ala. 632, 95 So. 3.

Title 51, Section 2, Code of Alabama 1940, as amended by Act No. 639, General Acts 1947, page 491, approved October 9, 1947, provides, in part, as follows:

"The following property and persons shall be exempt from ad valorem taxation and none other: (a) * * * all property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, property, real or personal, owned by any educational, religious or charitable institution, society or corporation, let for rent or hire or for use for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for education, religious or charitable purposes; * * *"

The Girl Scouts entered into a contract with the church to purchase the property and took possession of the two houses in June, 1948, and have used the property for Scout purposes since that date. On October 1, 1948, the Girl Scouts were the owners of this property for the purposes of taxation. *Ken Realty Co. v. State*, 247 Ala. 610, 25 So. 2d 675.

This office has held that property owned by the Boy Scouts of America and used exclusively for Scout purposes was used for purposes purely charitable, and was exempt from ad valorem taxation. Quarterly Report of Attorney General, Volume 18, page 57.

In the case of *State Tax Commission v. Commercial Realty Co.*, 236 Ala. 358, 182 So. 31, the Court said:

"(8) To enjoy the right of exemption under the provisions of § 91 of the Constitution, or § 2 of the General Revenue Law of 1935, Acts 1935, p. 257, the property must be irrevocably dedicated by the owner to exclusive charitable uses on the beginning of the tax year, when the obligation of the taxpayer arises, and such use must continue for and during the tax year. *State v. Alabama Educational Foundation*, 231 Ala. 11, 163 So. 527; *Anniston City Land Co. v. State*, 160 Ala. 253, 48 So. 659; *Id.*, Second Appeal, 185 Ala. 482, 64 So. 110."

The Boy Scouts of America and the Girl Scouts of America are similar organizations, and their property, when used for Scout purposes, is in the same category for purposes of taxation.

The premises considered, it is, therefore, my opinion that the property owned and used by the Girl Scouts of America for Scout purposes is exempt from ad valorem taxation for the tax year 1949. This exemption will continue as long as the ownership and the use of the property is not changed.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 13, 1948.

Hon. Ward W. McFarland,
State Highway Director,
State of Alabama,
CAPITOL.

Highways and Highway Department—Roads and Bridges—
Contracts—Bids.

The Highway Department has power and authority to contract with an individual, firm or private corporation to center-stripe highways under its jurisdiction and control.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of November 19, 1948, is as follows:

"As you know, during the past fiscal period the State Highway Department experienced a very critical shortage of funds for the construction and maintenance in operations of the Department. For this reason a good many essential operations concerning maintenance were delayed including the center-line striping of most of our highways, both Federal Aid and State roads. We have in our State approximately 7800 miles of hard surfaced roads, most of which now require as a safety measure the painting of a center-stripe and with the winter season approaching, it would almost be impossible for the State to paint the center-line with its forces.

"So as to assist us in the center-lining of the main highways, we have located a private corporation who paints center-line stripes on highways and has sufficient equipment and experienced personnel to restripe or paint approximately 20 miles of hard surfaced highways per day. We believe that it would be most advantageous for this Department to enter into a contract with this corporation for the painting of 500 miles of our main highways, namely: U. S. 31, which covers from the Tennessee line to Mobile, Alabama, and U. S. 80, which extends from the Mississippi line east to the Georgia line.

"In this connection, we have prepared a contract to cover the above mentioned center-line painting, also we have prepared our requisition number HD 98-127 which is dated November 18, 1948 and which covers the proposed contract. In addition, attached to the requisition is the proposed sections of highway along the routes mentioned above. These documents are attached and it is respectfully requested that your good office advise by an official opinion as to whether or not this Department is within its legal rights in making such a contract for the work therein specified."

Title 23, Section 3, Code of Alabama 1940, defines generally the duties and powers of the Highway Department. In pertinent part, that section provides that it shall be the duty of that department "to construct, standardize, repair and maintain roads and bridges of this state." Section 22, of the same title, specifically provides that the Highway Department may enter into contracts with individuals, firms, or private corporations, to do any work in the construction, repair or maintenance of the roads, bridges or highways in this state. Inherent in the power to construct, repair and maintain the highways is the power to enact reasonable rules and regulations controlling their use, including the installation and maintenance of modern safety and traffic control devices. See Title 36, Section 47, Code of Alabama 1940, and "Rules of the Road" and "Regulations as to Size and Weight" contained in Title 36.

Therefore, I am of the opinion that the Highway Department has power and authority to contract with an individual, firm, or private corporation to center-stripe highways under its jurisdiction and control.

The installation of this safety measure is not, in my judgment, a "public improvement" within the meaning of Act No. 492, General Acts 1947, page 338, relating to and regulating contracts for public works. You advise me that an emergency created by lack of funds has precluded the center-lining of these arterial highways, thereby creating a traffic hazard which must be expeditiously eliminated. Therefore, award of the contract comes within the rules stated in a former opinion rendered you and found in Quarterly Report of the Attorney General, Vol. 51, page 171, your authority for entering into such contract being found in Title 23, Section 29, Code of Alabama 1940.

The documents attached to your request are returned herewith.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 15, 1948.

Hon. Frank A. Reagan,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Municipalities.

Title 37, Chapter 4, Article 3, Code of Alabama 1940, providing the procedure by which cities in the State of Alabama generally that have adopted a commission form of government, may abandon the same, is not applicable to the city of Gadsden, which operates under a commission form of government pursuant to Title 62, Chapter 4, Article 9, Subdivision 2, Code of Alabama 1940.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of October 20, 1948, is as follows:

"Re: Inquiry as to Duty of Probate Judge under 1940 Code, Title 37, Section 121, as to Petition for Election in the City of Gadsden on Proposition of Abandoning Commission Form of Government in said City.

"I am advised that petitions are being circulated in the City of Gadsden, Alabama, for the signatures of qualified electors therein

with a view to having such petitions presented to me as Judge of Probate of Etowah County, Alabama, under the provisions of 1940 Code of Alabama, Title 37, Section 121, as a condition precedent to the authorization of an election on the proposition of abandoning the Commission Form of Government in the City of Gadsden, Alabama. Said section of the Code requires me as Judge of Probate, within ten days from the receipt of such petition, to check the sufficiency thereof and make certificate of the same to the duly constituted authorities of said City.

"The Commission Form of Government in the City of Gadsden, Alabama, is provided by 1940 Code of Alabama, Title 62, Sections 416-428, both inclusive:

"I wish to obtain your opinion in writing on the following question of law connected with my duties as Judge of Probate of Etowah County, Alabama: Does 1940 Code of Alabama, Title 37, Chapter 4, Article 3, which embraces Section 121 of Title 37 of the 1940 Code, apply to the City of Gadsden, Alabama, and is it my duty as Judge of Probate of Etowah County, Alabama, to act upon a petition presented under the provisions of said Section 121 of Title 37 calling for an election in the City of Gadsden, Alabama, on the proposition of abandoning the Commission Form of Government in such City?

"In view of the ten day limit provided for the Judge of Probate taking such action, I should like to have your opinion on this question at your earliest convenience in order that I may comply with the law applicable to this situation within the time prescribed by such law."

The Code of Alabama 1940 provides for two types of commission form of government for cities in the State of Alabama generally, each of which type may be adopted by the qualified electors of a particular city in accordance with the procedure established therefor. The first type is provided for by Title 37 (Municipal Corporations), Chapter 4, Article 1, Code of Alabama 1940. This type is applicable generally to any city in the State of Alabama having a population of more than one thousand, according to the last federal census or any federal or municipal census that may be taken hereafter, that may adopt the same. The other type is provided for by Title 37, Chapter 4, Article 2, Code of Alabama 1940, and is applicable generally to any city in the State of Alabama that may adopt the same. Title 37, Chapter 4, Article 3, Code of Alabama 1940, provides the procedure by which cities in the State of Alabama generally that have adopted a commission form of government may abandon the same.

The origin of this article is Act No. 699, General Acts 1915, page 770, which was codified in the Code of Alabama 1923 as Sections 2394-2408. The constitutionality of the original act was upheld by the Supreme Court of Alabama in the cases of *State ex rel. Terry v. Lanier*, 197 Ala. 1,

72 So. 320, and *Wilkinson v. Stiles*, 200 Ala. 279, 76 So. 45. As originally enacted, and as codified in the Code of Alabama 1923, this act did not apply to cities having a population of thirty-five thousand or more according to the last or any subsequent federal census, but this limitation was omitted from the Code of Alabama 1940. It is also interesting to note that in the Code of Alabama 1940 it was codified in the title on Municipal Corporations, as a part of Chapter 4 thereof, the same chapter which provides for the two types of commission form of government for cities in the State of Alabama generally.

The city of Gadsden operates under a commission form of government pursuant to Title 62, Chapter 4, Article 9, Subdivision 2, Code of Alabama 1940, which had its origin in Act No. 234, General Acts 1939, page 388. This commission form of government was not adopted by the qualified electors of the city of Gadsden, but rather was established for said city by the legislature itself. A perusal of this subdivision shows that the commission form of government under which the city of Gadsden operates is different in material respects from the commission forms of government provided for by either Article 1 or Article 2, *supra*.

Subdivision 2, *supra*, establishing a commission form of government for the city of Gadsden, is completely silent as to the manner by which the same may be abandoned. Consequently, if there is any procedure for the abandonment of the commission form of government in the city of Gadsden, it must be found in Article 3, *supra*, dealing with the abandonment of the commission form of government in cities generally that have adopted the same.

I am of the opinion that this article has no application to the city of Gadsden, and that there is no procedure prescribed by statute for the abandonment of the commission form of government under which this city operates. If the legislature had intended that the procedure provided by it for the abandonment of the commission form of government in cities generally that have adopted the same should apply to the city of Gadsden, it would have been a simple matter for it to have said so in the act by which it established the commission form of government for said city. However, it did not do so.

This aside, I think there is a more compelling reason why Article 3, *supra*, does not apply to the city of Gadsden. It is a general provision of law relating to a general subject, namely, the abandonment of the commission form of government in cities generally that have adopted the same; while Subdivision 2, *supra*, is a special provision of law relating to a specific subject, namely, the commission form of government of the city of Gadsden.

It is a well known principle of statutory construction that where there is a general provision of law dealing with a general subject and a special provision of law dealing with a specific subject, the special provision will be construed as an exception to the general law and, therefore, controlling or, stated differently, that if there is an apparent

conflict between a general provision of law dealing with a general subject and a special provision of law dealing with a specific subject, the general provision will yield to the special, and both will be given effect so as not to conflict. *Herring v. Griffin*, 211 Ala. 225, 100 So. 202; *Downing v. City of Russellville*, 241 Ala. 494, 3 So. 2d 34; *State v. Elliott*, 246 Ala. 439, 21 So. 2d 310; *Miller v. State ex rel. Peek*, 249 Ala. 14, 29 So. 2d 411.

In the last case above cited, the question for decision was stated by Mr. Justice Livingston, for the Supreme Court, as follows:

"As to the chief of police, chief of the fire department, and policemen and firemen of the city of Anniston, we are unable to reconcile the provisions of sections 402 and 420, Title 62, Code; and the question is, which shall prevail?"

After stating the above principle of statutory construction, and quoting from *Herring v. Griffin*, *supra*, he concluded:

"So, applying this rule to the instant case, we find that the legislature has made special provision as to policemen and firemen of the city of Anniston. Section 420, *supra*, of the Commission Form of Government Act is a general provision covering all employees of the city, and insofar as the policemen and firemen are concerned must give way to section 402, *supra*, of the Civil Service Law. This leaves ample room for the operation of section 420, *supra*, in respect to all other city employees, except those specially taken without its operation by the section itself."

We may well paraphrase his language there and apply it to the instant situation as follows: So, applying this rule to the instant case, we find that the legislature has made special provision as to the commission form of government of the city of Gadsden (Subdivision 2, *supra*). Article 3, *supra*, is a general provision dealing with the abandonment of the commission form of government in cities generally that have adopted the same, and insofar as the city of Gadsden is concerned must give way to Subdivision 2, *supra*. This leaves ample room for the operation of Article 3, *supra*, in respect to cities generally that have adopted the commission form of government.

In view of my holding that Article 3, *supra*, does not apply to the city of Gadsden, it necessarily follows that it is not your duty, as Judge of Probate of Etowah County, Alabama, to act upon a petition presented to you under said article, calling for an election in the city of Gadsden on the proposition of abandoning the commission form of government in such city.

Inasmuch as Subdivision 2, *supra*, also applies to the city of Anniston (Title 62, Chapter 4, Article 9, Subdivision 1, Code of Alabama 1940), the holding of this opinion is equally applicable to the city of Anniston.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 20, 1948.

Hon. John Graves,
State Comptroller,
CAPITOL.

State Bar Association—Secretary.

Claim filed by Secretary of State Bar Association is a legal claim against the funds set aside under Title 46, Section 30, Code of Alabama 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of December 14, 1948, is as follows:

"Attached please find claim in favor of Hon. Lawrence F. Gerald, Sr., to be charged to the State Bar Fund.

"This claim is self-explanatory and I request your official opinion whether the claim may be legally disbursed by this office and whether any liability will attach on this office if the claim is paid as presented."

In answer to your request, you are advised that in my opinion the claim filed by Mr. Lawrence F. Gerald, Secretary of the Alabama State Bar Association, is a legal claim against the funds in the treasury to the credit of the Alabama State Bar Association.

Under Section 30 of Title 46, Code of Alabama 1940, a fund is set aside in the State Treasury for use of the Alabama State Bar Association, which constitutes a separate fund to be disbursed by the Treasurer on the order of the Board of Commissioners of the State Bar. Title 46, Section 32, Code of Alabama 1940, provides that for the purpose of carrying out the objects of this article, and for the exercise of the powers therein granted, the Board of Commissioners shall have power to make orders concerning the disbursement of the fund set aside by Section 30, *supra*.

It appears from the claim presented by Mr. Gerald, that this disbursement has been authorized by the Board of Commissioners of the Alabama Bar Association, and in my opinion you may legally pay this claim out of the funds set aside for the use of the Alabama Bar Association.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 20, 1948.

Hon. Hunter Phillips,
Judge of Probate,
Choctaw County,
Butler, Alabama.

Costs and Fees—Contracts—Judges of Probate—Words and
Phrases, "Probating Deed."

The fee of fifty cents provided for in Title 11, Section 29, Code of Alabama 1940, for probating a deed or other conveyance, has reference to Title 47, Section 31, Code of Alabama 1940, and not to the acts of examining, filing, indexing and entering a deed or other conveyance.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of December 14, 1948, is as follows:

"I thank you for your opinion under date of December 9, 1948, holding that there is no provision of law authorizing probate judges to collect a fee for filing, indexing, and entering a transfer of conditional sales contract; but, I respectfully request further consideration of the question which I attempted to raise in my original request for opinion.

"I understand that I must record a transfer of a conditional sales contract and that I am entitled to a fee of fifteen cents for each one hundred words for recording the same, as provided by Title 11, Section 29, Code of Alabama 1940. However, this section also allows the judge of probate a fee of fifty cents for 'each acknowledgment or probate of deed or other conveyance.' As I see it, the only thing a judge of probate may do in probating a deed or other conveyance (other than a will), besides recording the same, is to examine, file, index, and enter it on his records. If this is true, am I not entitled to this fifty cents fee for probating such a conveyance, instantly the transfer of a conditional sales contract, in addition to the fee of fifteen cents for each one hundred words for recording the same?

"If I am mistaken in my view that the recording, examining, filing, indexing, and entering of a deed or other conveyance (other than a will) amounts to the probating of the same, then please advise me just what constitutes the probating of a deed or other conveyance (other than a will), for which I am allowed the fifty cents fee above referred to."

The above request for an official opinion is supplementary to a request for an official opinion answered by this office on December 9, 1948, which opinion was addressed to you.

In my opinion, the acts described in your inquiry, namely, examining, filing, indexing, and entering on the record the transfer of a conditional sales contract, is not the probating of a deed or other conveyance, within the meaning of Title 11, Section 29, Code of Alabama 1940.

Among other fees allowed to the judges of probate under the provisions of Title 11, Section 29, Code of Alabama 1940, is a fee of fifty cents for, "Each acknowledgment or probate of deed or other conveyance." In my opinion, the fee of fifty cents, to which you refer, for probating a deed or other conveyance, has reference to the service performed by the probate judge under Title 47, Section 31, Code of Alabama 1940.

In other words, if a person comes into the office of the judge of probate with a deed or other conveyance and requests the probate judge to certify that a subscribing witness to the deed appeared before the probate judge, and, upon oath, states that the grantor voluntarily executed the deed in the presence of said witness, and in the presence of the other witness, and the judge of probate so certifies according to Title 47, Section 31, Code of Alabama 1940, then the deed or other conveyance has been "probated."

It is unnecessary to add that this act of probating a deed is quite different from the acts described in your inquiry.

It is my opinion, therefore, that the fee of fifty cents for probating a deed or other conveyance is not applicable when the judge of probate merely examines, files, indexes and enters such transfer.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

December 20, 1948.

Hon. Lee McCorkle,
Sheriff, Colbert County,
Tuscumbia, Alabama.

Sheriffs—Military and Naval Affairs—Costs and Fees.

Compensation for feeding military prisoners committed to jail should be paid out of funds of the Military Department, and separate bill should be forwarded to the Adjutant General.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of December 9, 1948, is as follows:

"We have been receiving orders issued by the Captain CAC Alabama National Guard, Summary Court to pick up and place in jail members of National Guard who have been tried by a Summary Court and fined. Being unable to pay said fine they are ordered to be held in jail one day for each dollar of the fine.

"We have been told there is a certain fund set aside to take care of this cost, but no one seems to know how we are to go about collecting our cost in these cases. Will the state pay for feeding these men on the regular Feed Bill or does that go in separately?"

In my opinion, the compensation to which the sheriff is entitled for feeding military prisoners should be paid by the Military Department from that appropriation in the General Appropriation Act to the Military Department, "For active military service - - - \$85,000.00." Act No. 320, General Acts 1947, page 183, 188.

The sheriff's bill should be forwarded to the Adjutant General of the Alabama National Guard.

Title 35, Section 140, Code of Alabama 1940, provides as follows:

"Sheriffs, other civil officers, and national guardsmen executing the warrants or process of a military court, including arrests made at the order of unit commanders as a preliminary to trial for violation of provisions of this chapter shall receive as compensation therefor the fees allowed by law for like service in the civil courts, the same to be taxed by such court. All such fees and expenses of trial in court-martial cases, and the fees of sheriffs and jailers in all cases for the keep of prisoners, shall be paid by the adjutant general out of the appropriations authorized by section 185 of this title."

Also, Title 35, Section 185, Code of Alabama 1940, as amended by Act No. 626, General Acts 1947, page 478, Section 9, provides as follows:

"In addition to the monies to be appropriated for the purpose stated in the preceding section, there shall be appropriated by the legislature at each of its biennial sessions, or such other sessions as conditions may require, out of the monies not otherwise appropriated, such sum as may be necessary for pay, allowances, subsistence, shelter, travel and other necessary expenses of the militia called into active military or naval service of the state for the purpose of enforcing the law, preservation of peace, for the security of lives of citizens, for aid and relief of our citizens in case of

disaster, for the protection of property and for such other purposes as the governor may, for specific reasons designate as in the active military or naval service of the state. The disbursement of all funds appropriated for the purpose of carrying out the provisions of this chapter shall be with the approval of the governor, under such rules and regulations as the commander-in-chief may prescribe."

The appropriation above referred to in the General Appropriation Act for 1947-48 is the appropriation made pursuant to Section 185, supra. You are therefore advised to make out a separate bill for the feeding of military prisoners, and forward the same to the Adjutant General of the Alabama National Guard.

I also suggest that on your bill to the Adjutant General you should refer to Title 35, Section 140, Code of Alabama 1940.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 21, 1948.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
CAPITOL.

Offices and Officers — Official Bonds — Calhoun County —

Constitution of Alabama 1901, Amendment XXXIII—
Act No. 119, Local Acts 1947, page 77—Title 41, Sections 80, 86
and 96, Code of Alabama 1940.

The Court of County Commissioners of Calhoun County, under Title 41, Section 96, Code of Alabama 1940, is authorized to approve the payment of premiums of bonds of county employees in the tax collector's office when said bonds are fixed at an amount in excess of \$1,000.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of November 19, 1948, is as follows:

"I am enclosing letter from Mr. J. Fred Gurley, Tax Collector, Calhoun County, Alabama. I would appreciate an opinion from you on the question asked by Mr. Gurley."

Mr. Gurley's letter to you under date of November 17, 1948 is as follows:

"I have two regular employees. I am paid by the county. My bookkeeper and chief clerk are paid by the county also. They are each under bond, \$2,000.00, I believe. I have a special clerk who helps me 3 months. She too is under bond. Is it legal for the county to pay the premium on their bonds? The amount is small but their salary is also small. I feel sure the Commissioners will pay it if they can do so legally."

Amendment XXXIII to the Constitution of Alabama 1901, submitted December 17, 1935 and proclaimed ratified January 2, 1936, provided that the office of Tax Collector of Calhoun County might be placed on a salary instead of a fee basis by the Legislature, and validated previous acts of the 1935 Legislature so placing the tax collector's office on a salary basis. Various acts of the Legislature have since either changed the amount of salary of the tax collector or the amount of allowance for the clerks, deputies and clerical assistants of his office in Calhoun County. The last such act is Act No. 119, Local Acts 1947, page 77. Section 1 thereof is quoted as follows:

"Section 1. That the combined salaries, or compensation of the clerks, deputies, and assistants in the office of the Judge of Probate of Calhoun County; shall not exceed thirteen thousand eight hundred (\$13,800.00) dollars per annum; that the combined salaries of the clerks, deputies, and assistants in the office of the Tax Collector of Calhoun County, shall not exceed four thousand four hundred and sixty (\$4,460.00) dollars per annum; that the combined salaries of the clerks, deputies, and assistants in the office of the Tax Assessor of Calhoun County, shall not exceed eight thousand three hundred and sixty (\$8,360.00) dollars per annum, which said salaries, or compensation shall be paid in equal monthly installments, out of the general funds of Calhoun County, in the same manner as the clerks, deputies, and assistants in said offices are now paid."

Section 2 thereof reads as follows:

"Section 2. That the County Commission, or like governing body of said county is hereby authorized, empowered and directed to appropriate and set aside out of the general fund of Calhoun County, the amounts fixed for clerical assistants in the offices of the Judge of Probate, Tax Collector, and Tax Assessor, respectively, and the County Treasurer, or County Depository, of said County is hereby authorized to pay said amounts upon warrants drawn in the same manner as other employees in said offices are paid."

In your request for an official opinion, you state that your bookkeeper and chief clerk are paid by the county and are under a \$2,000 bond. You also state that you have a special clerk who is under bond, and while you do not say so, it is assumed that she is also paid by the county.

Title 41, Section 80, Code of Alabama 1940, reads as follows:

"§80. Governing body fixes bonds.—The court of county commissioners, boards of revenue or other like governing bodies of the respective counties are hereby authorized and empowered to fix and approve the official bonds of all other county officials and employees, and clerks, deputies and employees in county offices in such an amount or amounts as may in their judgment be necessary for the safety and security of public funds or other funds and as the public interest may demand subject to such limitations as are specifically provided herein and made applicable to each particular county official."

Title 41, Section 86, Code of Alabama 1940, reads as follows:

"§86. Bonds of county employees, clerks, etc.—When in the judgment of the court of county commissioners, board of revenue or like governing body of any county it is considered necessary to the protection of the public interests, such governing body may require any county employee or any clerk, deputy or employee in any county office to give bond in such amount and with such surety as may be approved by said governing body, unless such bond is already provided for in this article."

It can be seen from the statutes noted above that the courts of county commissioners or boards of revenue of the various counties are vested with the authority to fix and approve the official bonds of employees of the county.

Title 41, Section 96, Code of Alabama 1940, reads as follows:

"§96. Payment of premiums.—The premiums on all bonds provided for in this article, when made by surety companies, shall be paid by the respective counties out of the general funds of said county, except that the premiums on the bonds of superintendent of education and of custodian of county public school funds shall be paid by the board of education of said county out of the three mill school tax and the premiums on all bonds of one thousand dollars or less shall be paid by the officer making said bond."

The statute quoted immediately above allows for a payment of the premium on bonds in excess of \$1,000.00 out of the general funds of the county. Therefore, it is my opinion that the court of county commissioners may approve payment of the premium of the bookkeeper and chief clerk you refer to in your request for an opinion, inasmuch as you state that their bonds are fixed at \$2,000.00. You do not state the amount of bond fixed for the special clerk referred to. If the amount of this bond is fixed in excess of \$1,000.00, the court of county commissioners is also authorized to approve payment of the premium on this bond. If the bond is fixed at \$1,000.00 or less, it must be paid

for by the individual, in accordance with the last sentence of the statute quoted above, and you are so advised.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 21, 1948.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Licenses—Conservation—Game and Fish.

1. A person fishing in a private pond is not required to procure fishing license regardless of method used to catch or take the fish.

2. Private waters are defined as any body of water wholly on lands held in fee or in trust, or under lease by any one person, firm, corporation, or club and include impoundments that are wholly on lands held in fee or in trust, or under lease by any one person, corporation, or club and regardless of the extent of the impounded stream, provided such stream is non-navigable.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of September 25, 1948, is as follows:

"The question has been raised in this office on numerous occasions in reference to the license for fishing with rod and reel and artificial bait.

"It has been held if a person fishes with rod and reel in a privately owned pond leased from the owner by said person, but said person does not reside on the land, he is not required to have a license to fish in said pond.

"Two boys were recently arrested for fishing without license in a privately owned pond which they had leased from the owner and the game warden held that they were required to buy a license.

"Will you kindly give us a ruling as this question is frequently asked in this office and according to the license for fishing with rod and reel and artificial bait Title 8, Section 38 in the 1940 Code

states 'fishing in public waters' and a privately owned or leased pond is not public waters?

"Thanking you for a prompt reply."

The law regarding your question seems to make the answer clear.

Section 38, Title 8, 1940 Code, reads in part as follows:

"License for fishing with rod and feel and with artificial bait.—No resident of this state over the age of sixteen years shall take, catch, kill, or attempt to take, catch, or kill any fish in any of the public waters of this state in which fresh water fish appear by angling with rod and reel, commonly called fly rod, bait casting rod, or trolling rod, or by the use of any artificial bait, fly, or lure without first procuring a fishing license and paying therefor the sum of one dollar, and such fishing license shall not be transferable and it shall be unlawful to borrow or lend any such fishing license. . . . Any person who violates any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than ten dollars nor more than twenty-five dollars for each offense."

In order to apply this law it is necessary to know what waters the Legislature regards as public and what waters are defined as private. This matter was specifically dealt with by an act of the 1943 Alabama Legislature, 1943 General Acts, page 541, which is quoted as follows:

"Public and Private Waters.—All waters of this state are hereby declared to be public waters if such waters be natural bodies of water such as rivers, creeks, brooks, lakes, bayous, bays, channels, canals or lagoons or be dug, dredged, or blasted canals and if these waters traverse, bound, flow upon or through, or touch lands title to which is held by more than one person, firm, or corporation. Any water impounded by the construction of any lock or dam or other impounding device placed across the channel of a navigable stream is declared a public water. All waters caused to be impounded or owned or leased by any municipality, county, or other governmental unit are also declared to be public waters; likewise all impoundments owned or operated by public utilities when such impoundments touch or bound lands title to which is held by more than one person, firm, or corporation are declared to be public waters, provided that before any person may go or be upon the posted lands of another for the purpose of fishing he or she shall procure the consent of the landowner or his agent. Private waters are defined as any body of water wholly on lands held in fee or in trust, or under lease by any one person, firm, corporation, or club and include impoundments that are wholly on lands held in fee or in trust, or under lease by any one person, firm, corporation,

or club, and regardless of the extent of the impounded stream, provided such stream is non-navigable."

In my opinion, a person fishing in a private pond is not required to procure a fishing license regardless of the method he uses to catch or take the fish.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 21, 1948.

Hon. C. E. McNatt,
Clerk, Circuit Court,
Franklin County,
Russellville, Alabama.

Franklin County—Inferior Courts—Clerks of Inferior Courts
—Costs and Fees—Bastardy.

1. Clerk of the Law and Equity Court of Franklin County is not entitled to five per cent commission for collecting judgment in bastardy case, for the reason that the money is not remitted to the State under Title 11, Section 22, Code of Alabama 1940.

2. Only circuit clerks are entitled to collect five per cent commission under the provisions of Title 11, Section 22, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of December 8, 1948, is as follows:

"I am inclosing herewith a copy of the judgment entry of the Law and Equity Court in the case of _____ vs. State which is a bastardy case. The judgment of the court is self explanatory. I now hold the \$800.00 paid to me as clerk of the Law and Equity Court for the support and education of the bastard child. The local act creating the Law and Equity Court makes the Clerk of the Circuit ex-officio clerk of the Law and Equity Court and as clerk of the Law and Equity Court I get the same fees and commissions as I would for similar services as clerk of the circuit court.

"Am I entitled to a commission as clerk of the court in receiving and disbursing the \$800.00 which I collected for the support and education of the bastard child under the order of the court? Should

I immediately pay the \$800.00 to the Probate Judge of the County and pay the same all at one time?

"The first payment to the child is to be made on the first Monday in January, therefore, I will appreciate your opinion before that time."

In my opinion, you should pay the sum of \$800.00 to the probate judge, and you are not entitled to a five per cent commission under the provisions of Title 11, Section 22, Code of Alabama 1940.

There is enclosed with your request for an official opinion a judgment entry made by the Law and Equity Court of Franklin County. It appears from this judgment entry that the issue was found in favor of the State. It further appears from the judgment entry that the defendant was ordered to enter into a bond in the sum of \$1,000.00 payable to the State of Alabama, and conditioned as required by law to pay the probate judge the sum of \$80.00 on the first Monday in January of each year for ten years for the support and education of the child. It further appears from the judgment entry that the defendant did not make such a bond, but paid the clerk of the Law and Equity Court of Franklin County the sum of \$800.00. The court then ordered, "that the clerk shall immediately pay said \$800.00 to the Probate Judge, who shall hold same in trust and pay \$80.00 on the first Monday each year for ten years for the support and education of the child."

I am assuming, for the purpose of this inquiry, that the fee which you claim is claimed under the provisions of Title 11, Section 22, Code of Alabama 1940. which provides that the clerks and registers of the several circuit courts of the State of Alabama shall receive five per cent of any sum or sums collected by such clerk or register for the State of Alabama as compensation for the collection and remittance of the same. Title 11, Section 22, Code of Alabama 1940.

In my opinion, you are not entitled to retain five per cent commission for the collection of the amount referred to in the judgment, for the reason that the money is not remitted to the State of Alabama, but remitted to the probate judge for the support and education of the child. Since the clerk does not remit any money to the State of Alabama, it is my opinion that Title 11, Section 22, Code of Alabama 1940, is not applicable.

You are further advised that you are not entitled to claim the five per cent commission, for the reason that you are making said claim as clerk of the Law and Equity Court of Franklin County. Section 4, Act No. 404, Local Acts 1923, page 272. This office has ruled several times that the clerk of an inferior court is not entitled to fees prescribed by Title 11, Section 22, Code of Alabama 1940, but that said fees are payable only to the circuit clerk. Quarterly Report of Attorney General, Vol. 20, page 284.

You are further advised that the amount collected should be paid immediately and all at one time to the probate judge in accordance with the judgment of the Law and Equity Court of Franklin County.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 21, 1948.

Hon. John E. Mandeville,
Clerk, Circuit Court,
Mobile County,
Mobile 15, Alabama.

Elections—Election Officials—Appointment—Mobile County.

Title 17, Sections 120-125 and 349, Code of Alabama 1940;
Title 62, Sections 95-103, Code of Alabama 1940.

The board for the appointment of election officials is charged with the duty of appointing election officials for each voting place within the county for each state and county election, general, special, or primary, the number of officials appointed being dependent upon the number of voting places located within the county and the number of voting machines or ballot boxes located within each of such polling places.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of December 6, 1948, is as follows:

"As a member of the Election Appointing Board of Mobile County, I respectfully ask your opinion concerning the following:

"Title 17, Section 125, Code of Alabama of 1940, Entitled: 'Political Parties Furnish Lists From Which Appointments are Made,' reads as follows:

"Each Political Party or organization having made nominations may, by the Chairman of its state or county executive committee or nominees for office, furnish the appointing board a list of not less than three names of qualified electors from each voting place, and from each of said lists an inspector and clerk shall be appointed for each voting place; - - -'

"In view of the fact that Mobile County is divided into Wards and Precincts, and that each of said Wards and Precincts, or at least some of them, are provided with several ballot boxes, or several

voting machines, do the words 'voting place,' as used in Title 17, Section 125, quoted above, mean the entire Ward or Precinct; or, do the words 'voting place,' as used in Title 17, Section 125, quoted above, mean each individual ballot box or voting machine within the said Wards and Precincts?

"An early opinion concerning the above question, from your office, will be greatly appreciated. This question came up during the General Election just past, and I would like to have it cleared up before another election comes along."

In my judgment, your inquiry finds answer in the language of Title 17, Section 125, Code of Alabama 1940, the statute you wish me to construe. Such statute provides, in full, as follows:

"Each political party or organization having made nominations may, by the chairman of its state or county executive committee or nominees for office, furnish the appointing board a list of not less than three names of qualified electors from each voting place, and from each of said lists an inspector and clerk shall be appointed for each voting place; provided, that where there are more than two lists filed, the appointments shall be made from the lists presented by the two political parties having received the highest number of votes in the state in the next preceding regular election, if each of said parties present a list."

Such statute specifically requires that the appointing board shall appoint, from the lists so furnished it, election officials for each voting place within the county. The provisions of Title 17, Section 120, Code of Alabama 1940, are to like effect, such statute, likewise making it the duty of the appointing board to appoint the required election officials for each place of voting. I likewise call your attention to Title 17, Section 349, Code of Alabama 1940, applicable to primary elections, which statute also provides that the appointing board shall appoint election officials for each polling place. With reference to Section 120, *supra*, I would point out that in those counties in which the use of voting machines has been adopted, the appointment of a returning officer is not necessary. Quarterly Report of Attorney General, Volume 48, page 33.

The fact that there may be within any ward or precinct more than one polling place, in my judgment, has no effect upon the operation of the above statute, the provisions of which are clear to the effect that election officials shall be appointed for each place of voting.

Considering next your question concerning the appointment of election officials for those polling places in which there are located more than one voting machine or ballot box, I wish to call your attention to the provisions of Title 17, Section 105, Code of Alabama 1940, which statute provides that:

"The election officers for each voting machine shall consist of an inspector, a chief clerk, and a first and second assistant clerk.
* * *" (Emphasis supplied)

It, therefore, appears that if there be more than one voting machine located within any polling place, election officials are to be appointed for each machine so used in the election.

Relative to those voting places in which there are located more than one ballot box for the receipt of paper ballots, I call your attention to the provision of Title 62, Sections 95-103, Code of Alabama 1940, which statutes are applicable to Mobile County alone. These statutes provide that in Mobile County the probate judge shall separate the lists of qualified registered voters in said wards or districts that lie within the limits of each incorporated city or town or that are commonly known and considered as city wards or districts into groups of not more than six hundred qualified registered voters in alphabetical order, and that qualified registered voters voting in wards or districts so designated shall cast their votes at the respective voting places designated, in the voting booth assigned to his or her respective alphabetical group. Section 100, supra, provides, relative to the appointment of election officials, as follows:

"* * * It being intended to provide that each box shall contain not more than six hundred votes and that the votes shall be cast in said voting place, and the legally constituted boards or committees by whatever name called, authorized and provided by law to appoint election officials for general, primary, special, or municipal elections shall appoint the necessary number of election officers for each group of six hundred voters as provided in this subdivision, as well as for county precincts or districts in the manner now prescribed by law for the appointment of such election official for wards, districts or precincts so that there shall be provided for each box in each separate voting booth three inspectors, two clerks and a returning officer."

It, therefore, appears that within those voting places located within what are designated as "city wards" wherein more than one ballot box is required, election officials should be appointed for each such ballot box.

Regarding the duties of the election appointing board, it is my opinion that the appointment of all election officials in state and county elections, general, special, or primary, falls within the duties of such appointing board, the required number of officials to be appointed being dependent upon the number of voting places designated by law and the number of voting machines or ballot boxes located within such polling places.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 22, 1948.

Hon. John Graves,
State Comptroller,
CAPITOL.

Constitutional Amendments—Governor's Proclamation.

Section 284, Constitution of Alabama 1901, as amended; Title 12, Section 132, Code of Alabama 1940; Title 55, Section 105, Code of Alabama 1940.

1. Cost of publication of Governor's proclamation in regard to those proposed amendments applicable to one county alone is chargeable to the individual county concerned.

2. Cost of publication of Governor's proclamation in regard to a proposed constitutional amendment affecting more than one county individually but not affecting the State as a whole, is chargeable to the individual counties concerned, each county to pay its pro rata share of such expense.

3. Cost of publication of Governor's proclamation in regard to those proposed constitutional amendments affecting the State as a whole, and no one county individually, is chargeable to the State, and no appropriation having been made for the payment of such expense, same is properly payable from the amount appropriated by the Legislature pursuant to provisions of Title 55, Section 105, Code of Alabama 1940.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of November 29, 1948, is as follows:

"There was appropriated within the General Appropriation Bill of the 1947 Legislature, Act No. 320, General Acts 1947, page 183, the sum of fifteen thousand dollars (\$15,000.00) under the following heading:

"For expense Governor's Proclamations for 1947-48"

"This sum was expended almost in its entirety with the small remainder thereof reverting to the General Fund upon September 30, 1948. No appropriation whatsoever was made for this expense for the fiscal year 1948-49.

"I have now had presented to me for payment claims in the amount of approximately twenty-seven thousand dollars (\$27,000.00), representing the expense incurred in the publishing of the proc-

lamations issued by the Governor in connection with the election held November 2, 1948, upon some eleven proposed amendments to the Constitution, the issuance of said proclamations being required under the provisions of Section 284, Constitution of Alabama 1901, as amended.

"Of the above eleven proposed amendments, some pertained only to individual counties while others were state-wide in nature and effect. It is respectfully requested that you advise me as to the following questions:

"1. Is the expense incurred in the publishing of such proclamations legally chargeable against the State of Alabama?

"2. May I legally pay from the General Fund those claims arising in connection with the publication of those proclamations concerning amendments pertaining to a single county, and thereupon make claim upon the individual counties concerned for reimbursement of such amounts under the provisions of Title 12, Section 132, Code of Alabama 1940?

"3. With regard to those proclamations published in connection with those proposed amendments relating to more than one county of the State but not to the State as a whole, is such expense chargeable against the State of Alabama or should I make claim upon the individual counties concerned for payment of their pro rata share of such expense?

"4. In the event that the expenses of the publication of proclamations is not to be borne by any of the counties in the State, then is it proper to pay such expenses from the state treasury?

"I shall be grateful to you if you will advise me as to the above."

In order to give answer to your inquiries, it is necessary that I consider the nature and scope of the eleven proposed amendments to the Constitution giving rise to the expense with which you are here concerned. As you have correctly stated in your request for opinion, the issuance and publication of the Governor's proclamation concerning election to be held upon such amendments is required by Section 284, Constitution of Alabama 1901, as amended. The particular feature of each of such proposed amendments pertinent to your present inquiry is whether such amendment is state-wide in scope and effect, or whether such amendment is applicable only to a single county, or counties, of the State. Reviewing such proposed amendments, I find that:

(a) Proposed amendment No. 1 is applicable only to Talladega County.

(b) Proposed amendment No. 2 is applicable only to Marion County.

(c) Proposed amendment No. 3 is applicable only to Escambia County.

(d) Proposed amendment No. 4 is applicable only to Tuscaloosa County.

(e) Proposed amendment No. 5 is applicable to all counties of the State other than the counties of Jefferson, Mobile and Montgomery.

(f) Proposed amendment No. 6 is applicable only to Jefferson County.

(g) Proposed amendment No. 7 is applicable only to a political subdivision of Houston County.

(h) Proposed amendment No. 8 is applicable only to Jefferson County.

(i) Proposed amendment No. 9 is applicable to the State as a whole, having application to no one county individually.

(j) Proposed amendment No. 10 is applicable to the State as a whole, having application to no one county individually.

(k) Proposed amendment No. 11 is applicable to Jefferson County alone.

The requirement that notice of election upon the adoption of proposed amendments to the Constitution be given by proclamation of the Governor, and likewise that the results of such election be made known by proclamation of the Governor is found within Section 284, Constitution of Alabama 1901, as amended. This constitutional provision, in pertinent part, provides as follows:

“* * * Notice of such election, together with the proposed amendments, shall be given by proclamation of the governor, which shall be published in every county in such manner as the legislature shall direct, for at least four successive weeks next preceding the day appointed for such election. * * * * The result of such election shall be made known by proclamation of the governor. * * * *”

The Supreme Court of the State, in the case of **State v. Mobile County**, 239 Ala. 502, 195 So. 878, had occasion to consider the provisions of Section 284, supra, together with Sections 285 and 286 as such sections relate to the payment of the expense incurred in the publication of such proclamations, and therein held that:

“And as to sections 284, 285 and 286 of the Constitution, they merely deal with the method of amendment and contain no reference which could in any manner be reasonably construed as a limitation upon the power of the lawmaking body as to the dis-

tribution of the cost of publication. Upon the question of cost these sections are silent. * * *

It, therefore, appears that one must look elsewhere for provisions of law relating to the payment of such expense.

Turning to Title 12, Section 132, Code of Alabama 1940, it is found that such statute provides that:

"Whenever an amendment to the constitution of Alabama, affecting only a county or a subdivision of a county or a municipality, is submitted to the people for ratification or adoption, the county which such amendment affects, or the municipality which such amendment affects, shall pay the expense of the publication of the governor's proclamation concerning such amendment, and the court of county commissioners or board of revenue of the county, when such amendment relates to a county or a part thereof, or the clerk, mayor, or other officer having authority to draw warrants on the treasury of the municipality, when such amendment relates to a municipality, shall, upon the presentation of a claim by the state certified by the department of finance for the necessary amount to be paid for such publication, make an order and draw a warrant payable to the state treasurer out of the funds of the said county or municipality as the case may be, and the custodian of the county funds or municipal funds, as the case may be, shall pay the amount of said warrant to the treasurer of the State of Alabama."

In the above-cited case of *State v. Mobile County*, the Supreme Court held such statute to be constitutional, and that as regards the payment of the cost of publication of those proposed amendments applicable to one county alone, such payment falls within the express language of this statute.

The fact that certain of the acts or resolutions of the Legislature submitting said proposed constitutional amendments to the vote of the electors of the State contained provisions to the effect that the expense of such election shall be paid by the State, cannot, in my opinion, alter the provisions of Section 132, *supra*, for the reason that provisions concerning the expense of such elections are matters of a legislative or statutory nature which should have been passed by the Legislature under its lawmaking authority, and subject to the various constitutional limitations which apply to the passage of statutes, and the inclusion of this matter in a proposed constitutional amendment amounts to a mere declaration of the Legislature, which is of no force and effect. *Jones v. McDade*, 200 Ala. 230, 75 So. 988; Quarterly Report of Attorney General, Vol. 22, page 7.

It is, therefore, my opinion that as regards the expense of publication of the proclamation of these amendments pertaining to a single county, such is an expense to be borne by the individual county concerned. This would be true as to those proposed amendments numbered

1, 2, 3, 4, 6, 7, 8 and 11. Further answering your second inquiry, it is my opinion that you may pay from the State treasury claims for the expense connected with the publication of the proclamations pertaining to such proposed amendments and thereupon, under the provisions of Title 12, Section 132, *supra*, make claim upon the individual counties for reimbursement of such expense. I base this holding upon the ruling of the Supreme Court in the case of *State v. Mobile Conty*, *supra*, wherein the Court was considering an identical situation and such practice did not receive the condemnation of the Court, which rather held that the individual county concerned was bound to reimburse the State treasury in the amount expended.

This brings me to consideration of that proposed amendment numbered No. 5, which, as I have indicated, is applicable to all counties of the State other than the counties of Jefferson, Mobile and Montgomery. The question arises as to whether the expense of the publication of the proclamations issued in connection with this amendment should be paid by the State or by the individual counties concerned, each of such counties paying its pro rata share of the expense so incurred. This particular amendment sought to authorize the various counties of the State, other than Jefferson, Mobile and Montgomery, upon favorable vote of the electors thereof, to levy a special county tax, the proceeds of which were to be used in the construction and maintenance of hospital or other public health facilities. As I understand said proposed amendment, the provisions thereof are to apply to each individual county as a unit, not to any two or more counties jointly, and the provisions of such amendment are in no sense state-wide in their purpose and effect, but entirely dependent upon the vote of the electors of each individual county.

This office has upon previous occasions considered the question of payment of the expense of the publication of the Governor's proclamation relating to amendments applicable to two counties individually, and has consistently held that in such case the expense is to be borne equally by the counties concerned. Quarterly Report of Attorney General, Volume 2, page 284; Quarterly Report of Attorney General, Volume 2, page 286; Quarterly Report of Attorney General, Volume 22, page 7.

The reasoning and theory upon which such holding is based seems to be that where the provisions of any proposed constitutional amendment affect each county individually and as a county unit, the expense of such publication is to be borne by the individual counties concerned, whereas if the provisions of such proposed amendment affect the counties jointly, or are state-wide in their force and effect, the cost of such publication is to be borne by the State. Applying such reasoning to the proposed amendment with which we are here concerned, it is my opinion that the expense of the publication of the proclamation issued in conjunction with amendment No. 5 should be borne by the sixty-four individual counties concerned, each county paying its pro rata share of such expense. This, you may pay in the same manner as the expense of publication of those amendments pertaining to a single county is

paid, and claim may thereupon be made upon the individual counties for reimbursement of same.

The provisions of those proposed amendments numbered 9 and 10 are state-wide in their force and effect and applicable to no one county individually. It is, therefore, my opinion that the expense of the publication of the proclamations issued in connection with these proposed amendments must be borne by the State. As you have correctly stated, no appropriation has been made for this purpose, although such appropriation was made for the fiscal year ending September 30, 1948. It is, therefore, my opinion that claims for such expense must be paid from the amount appropriated by the Legislature under the provisions of Title 55, Section 105, Code of Alabama 1940. Such an appropriation is found within the General Appropriation Bill (Act No. 320, General Acts 1947, page 183), in the amount of \$100,000.00. In my judgment, such appropriation was made in anticipation of just such a contingency as has now risen, and the expense of the publication of the proclamations issued in connection with proposed amendments Nos. 9 and 10 should be paid from such fund.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 23, 1948.

Hon. J. V. Chambers,
Judge of Probate,
Chambers County,
LaFayette, Alabama.

Counties—Agriculture and Industries.

Donating to the Piedmont Livestock Show Barn and Youth Center, Incorporated, is a matter that is within the discretion of the Governing Body of Chambers County.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of November 22, 1948, is as follows:

"The Piedmont Livestock Show Barn and Youth Center, Incorporated, has requested of the Commissioners Court of Chambers County, Alabama, a donation for the purpose of constructing a building in Dadeville, Alabama, as an aid in exhibiting livestock and in general in carrying out the objects for which said corporation was incorporated.

"A copy of the certificate of incorporation is herein enclosed.

"Said Commissioners Court wishes to know if such donation can be legally made for use in another county, and if so, under what authority of law?"

In answering your inquiry, I wish to quote from the certificate of incorporation of the Piedmont Livestock Show Barn and Youth Center, Incorporated, as follows:

"The undersigned persons having been on the 15th day of October, 1947, elected Trustees of a Corporation or society not of a business character to be formed under the provisions of the Alabama Code of 1940, Title 10, Chapter 7, Article 3, Section 124 to 132, inclusive, with all the rights, powers and privileges of a corporation organized under said sections of said Code and under the Constitution and laws of the State of Alabama, hereby make and file this certificate of Incorporation and certify as follows:

"First: The name of the Corporation shall be: Piedmont Livestock Show Barn and Youth Center, Incorporated.

"Second: The object and purpose of the Corporation are generally to conduct its affairs as an educational, recreational, health and welfare organization and the judging and showing of livestock and other farm products.

"(a) The specific purpose being to provide a recreational, educational, health and welfare program for the youth of the Piedmont area of the State of Alabama and to assist and encourage both the youths and adults of the Piedmont area of the State of Alabama to produce more farm products and grow, barter, exchange and produce a better breed and a greater number of livestock.

* * * * *

"Eighth: The Corporation shall not be authorized to issue shares of stock, is not of a business character, and is not formed for pecuniary profits of any individual member thereof."

If the governing body of Chambers County is of the opinion that the Piedmont Livestock Show Barn and Youth Center, Incorporated, will promote the agricultural resources of Chambers County, then it is my opinion the governing body may make a donation to the Center irrespective of the fact that the Corporation was organized for the benefit of the Piedmont area of the State, and that the first building will not be located in Chambers County.

This donation may be made under Title 12, Section 12, Subsection 22, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, which provides, in part, as follows:

"To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties.
* * * *"

This office has held that county governing bodies may appropriate and expend funds for the following in connection with the agricultural growth of the counties:

Baldwin County to appropriate county funds to a Cattle Show and Fair Association, a nonprofit corporation organized for the purpose of developing the livestock industry in the county.—Quarterly Report of Attorney General, Volume 51, page 151;

Elmore County authorized to appropriate county funds to the Elmore County Artificial Breeding Association, a nonprofit organization, organized for the purpose of developing and promoting a better cattle program for the county.—Quarterly Report of Attorney General, Volume 49, page 86;

County governing bodies authorized to appropriate and expend funds in assisting the Production Marketing Association in the payment of office rent in the furtherance of and promotion of agriculture.—Quarterly Report of Attorney General, Volume 46, page 127;

To purchase a motion picture machine for the sole use of County Extension Service Agents in projecting visual education on farm subjects.—Quarterly Report of the Attorney General, Volume 39, page 52;

To appropriate county funds for club house in promotion of agriculture.—Quarterly Report of Attorney General, Volume 20, page 51;

To furnish Farm Security Administration with telephone.—Quarterly Report of Attorney General, Volume 18, page 344;

To aid in payment of the administrative expenses of the officers of the Farm Security Administration.—Quarterly Report of the Attorney General, Volume 17, page 399;

To compensate an employee of the Triple A for additional and independent services performed for the county.—Quarterly Report of the Attorney General, Volume 17, page 247;

To pay the salary of an assistant for the Farm Security Administration program.—Quarterly Report of the Attorney General, Volume 10, page 132;

To install and maintain exhibit of agricultural resources.—Quarterly Report of the Attorney General, Volume 9, page 80;

To appropriate money for soil erosion and promotion of agriculture.—Biennial Report of the Attorney General, 1934-36, page 294;

To make an appropriation for the promotion of agriculture.—Biennial Report of the Attorney General, 1932-34, page 430.

The premises considered, it is my opinion that the question of donating to the Piedmont Livestock Show Barn and Youth Center, Incorporated, is a matter that is within the discretion of the County Governing Body of Chambers County.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 23, 1948.

Hon. J. C. Griffin,
Judge of Probate,
Perry County,
Marion, Alabama.

Counties—Hospitals—Funds.

1. When a hospital association has been organized in a county pursuant to the provisions of Act No. 211, General Acts 1945, page 330, for the purpose of constructing, etc., a hospital in the county, the directors of said hospital association, acting through its executive committee, and not the county governing body of the county, are vested with the power and authority to do any and all things necessary, subject to the approval of the State Board of Health, in the constructing, etc., of the hospital, including the expenditure of funds appropriated for such purpose by the county governing body as its share of the cost of the same.

2. Any county funds, not presently needed for other purposes, may be deposited in a bank on interest, even though the bank in which the same are deposited is other than the bank which has been selected as the county depository, in lieu of a county treasurer, for the county.

3. Any vacancies occurring among the membership of the directors of said hospital association are to be filled by the governing body of Perry County.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of July 24, 1948, is as follows:

"Pursuant to conversation with you on Thursday, July 22, 1948, I am enclosing herewith copies of all of the proceedings in the Commissioners Court of Perry County, with reference to the hospital bonds of this county. In connection therewith, I desire your opinion on the following matters:

"1. Please advise me whether or not the county governing body has the authority to pay this money out to the contractor as the building is being constructed or should they turn it over to the Hospital Committee for disbursement. Also, advise whether or not the county governing body will have to pass on and approve each item paid for prior to the issuance of a warrant in payment thereof.

"2. After the building site for the hospital has been approved by the proper authorities, would it be lawful for the county governing body to purchase the building site for the hospital and pay the same and also, pay the architects for furnishing the blue prints and plans for the hospital? It is my information that the State does not have the funds available at this time to put up their part of the money necessary to carry out the program. We desire to know if it will be legal for us to complete our part of the program prior to the time that the State has their funds available. Also, please, advise whether not the county governing body would have authority to pay a reasonable attorney's fee for passing opinion on the title of the property on which the hospital is to be located.

"3. It is the desire of the local Hospital Committee, in order to save expense of furnishing bond as custodians of the money, that they be authorized to appoint the judge of probate as an authorized officer to disburse this money, since the judge of probate is already under bond. Please, advise if this can be done legally.

"4. At the present time, the county's money is on deposit in the Marion Bank & Trust Company, Marion, Alabama, in the name of 'Hospital Funds' and is not drawing interest. Advise if the county would have authority to transfer this money to the Planters & Merchants Bank of Uniontown, Alabama, in order to obtain one per cent interest on the money, pending the disbursement of same. If it is your opinion that the county does have the authority to make this transfer, does such transfer have to be approved by the county governing body, prior to such transfer? It is our information that the Planters & Merchants Bank of Uniontown is an approved depository for county funds.

"I will deeply appreciate hearing from you with reference to your opinion on these matters at your earliest convenience."

You have subsequently requested of me verbally that I advise you as to the method of filling vacancies occurring among the membership of the directors of said hospital association.

It appears from the "copies of all of the proceedings in the Commissioners Court of Perry County, with reference to the hospital bonds of this county" (taken from the minutes of said court) which you have furnished me, from information which I have subsequently secured from the Secretary of State, the State Health Officer, and you, that:

1. A hospital association for Perry County was duly established and incorporated in 1946, pursuant to the provisions of Act No. 211, General Acts 1945, page 330. (This act has subsequently been amended by Act No. 271, General Acts 1947, page 114, and Act No. 643, General Acts 1947, page 496, but in respects not here material.)

2. Perry County has issued and sold \$60,000 of general obligation bonds, denominated "Hospital Bonds," for the purpose of constructing a hospital in said county, pursuant to the provisions of Title 12, Chapter 7, and the pertinent provisions of Chapter 6, Article 1, Code of Alabama 1940, as amended, and that the indebtedness evidenced by these bonds, together with all other indebtedness of the county, was, and is, within the constitutional debt limit of the county. Constitution of Alabama 1901, Section 224.

3. The proceeds from the sale of said bonds have been deposited in the Marion Bank and Trust Company, Marion, Alabama, in the name of "Hospital Funds," which bank is the duly selected and acting county depository, in lieu of a county treasurer, for Perry County. Title 12, Chapter 3, Article 2, Sections 43-53, Code of Alabama 1940.

4. In the construction of a hospital in Perry County, it is contemplated by the county governing body that such construction shall be in accordance with the provisions of Act No. 211, *supra*. In this event, it becomes unnecessary to give consideration to Title 12, Section 185, or Title 22, Section 189, Code of Alabama 1940, or any other statutory provision which might authorize a county to construct a hospital.

In view of the above, we must turn to Act No. 211, *supra*, for answers to your questions numbered 1, 2 and 3.

A perusal of this act shows that the active affairs of a hospital association organized thereunder are vested in an executive committee of not less than five nor more than nine directors to be selected by the directors (Section 11); that such an association is authorized to do all things necessary for the construction, etc., of a hospital, in cooperation with, and acting as agent for, the State Board of Health, pursuant to a cooperative contract for such purpose (Section 12); that the governing

bodies of each local political subdivision involved (and here Perry County is the only local political subdivision involved) are authorized to appropriate their respective shares of the cost of constructing, etc., such hospitals as determined upon by agreement between the executive committee of the association and the State Board of Health (Section 13); and that the sum so appropriated shall be paid into the treasury of the association and shall be paid out on certificate of the executive committee of the association (Section 13).

It is crystal clear from the provisions of this act that no county and no hospital association may receive Federal and/or State participation in the construction, etc. of a hospital except pursuant to agreements therefor entered into with the State Board of Health. Consequently, it would appear that neither the county governing body of Perry County nor the hospital association should do anything in regard to the construction, etc. of a hospital in accordance with the provisions of this act without first securing the approval of the State Board of Health.

Specifically answering your questions numbered 1, 2 and 3, you are advised that:

1. Your county governing body has no authority to pay out the money appropriated by it for the purpose of constructing, etc., a hospital to the contractor as the hospital building is being constructed, but, rather, should turn it over to the hospital association to be paid into the treasury thereof, and to be paid out on certificate of the executive committee thereof. It necessarily follows that your county governing body will not have to pass on and approve each item paid for prior to the issuance of a warrant in payment thereof, as this is a function of the executive committee of the association.

2. The purchase of a building site for the hospital, payment for the same, and payment to the architects for furnishing blue prints and plans for the hospital are all matters within the purview of the executive committee of the hospital association, and not your county governing body. Undoubtedly, the association would have authority to pay a reasonable attorney's fee for rendering an opinion on the title to the property on which the hospital is to be located out of the funds appropriated by your county governing body to it for the construction, etc., of a hospital.

I have previously pointed out that the question of whether or not a hospital association receives Federal and/or State participation in the construction of a hospital is a matter that addresses itself to the State Board of Health. Consequently, if your association desires to obtain Federal and/or State participation (and I understand that it does), I suggest that it do nothing in the premises without first securing the approval of the State Board of Health.

3. Since the monies appropriated by your county governing body as its share of the cost of constructing, etc. a hospital must be paid

into the treasury of the hospital association and paid out on certificate of the executive of the association, you could not be authorized to disburse this money unless you were made the treasurer of the association. However, should you be made the treasurer of the association, your bonds as Judge of Probate of Perry County and as chairman of the county governing body thereof would not cover your acts as such treasurer, inasmuch as you would be acting in an individual capacity rather than in your official capacity as Judge of Probate or chairman of the county governing body. Of course, it would be a matter of sound business practice for the association to require a proper bond for anyone acting as its treasurer, but this is a matter which addresses itself to the association.

Adverting now to your question No. 4, you are advised that a county may have only one county depository, in lieu of a county treasurer. See Quarterly Report of Attorney General, Volume 34, page 82, and Quarterly Report of Attorney General, Volume 46, page 28. However, in my opinion, Title 37, Section 265, Code of Alabama 1940, and Act No. 246, General Acts 1943, page 203, authorize your county governing body to deposit the funds derived from the sale of the general obligation "Hospital Bonds," hereinabove referred to, in a bank on interest, even though the bank in which the same are deposited is other than the bank which serves as the county depository, in lieu of a county treasurer. Title 37, Section 265, *supra*, deals with the investment of sinking funds provided for the retirement of bonds, and provides, among other things, that such sinking funds may be "deposited in bank on interest." Act No. 246, *supra*, deals with the investment of any municipal funds or county funds, not presently needed for other purposes, and provides that the same may be invested in any obligations in which sinking funds are authorized to be invested pursuant to Title 37, Section 265, *supra*. While Title 37, Section 265, *supra*, is not incorporated by reference in Act No. 246, *supra*, in as clear terms as it might be, I think it was the intention of the Legislature to make the provisions of that section, including the provision for the depositing of funds in a bank on interest, as applicable to any municipal or county funds not presently needed for other purposes, as it was theretofore applicable to sinking funds. The funds here considered are clearly county funds, as that term is used in Act No. 246, and will not be needed for the purposes until the same are paid to the hospital association. You will note that Act No. 246, *supra*, provides that the investment of such funds shall be made by the officer or agency controlling their disposition, which, in the instant case, is your county governing body. Cf. Quarterly Report of Attorney General, Volume 34, page 82, *supra*.

Regarding your latter inquiry relative to the filling of vacancies occurring among the membership of the directors of said hospital association, I call your attention to the provisions of Section 10 of Act No. 211, *supra*, as amended, which section provides, in pertinent part, as follows:

"Vacancies shall be filled for an unexpired term by the local governing body having the original appointment."

It is, therefore, apparent that in the instant case in the event of vacancies occurring among the membership of the directors of said hospital association such vacancies are to be filled for the unexpired term by the governing body of Perry County.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 29, 1948.

Hon. H. G. Horn,
Sheriff, Crenshaw County,
Luverne, Alabama.

Sheriffs—Courts of County Commissioners—Title 45, Sections 139, 174 and 184, Code of Alabama 1940—Title 12, Sections 12(1), 177 and 178, Code of Alabama 1940.

The court of county commissioners or the board of revenue of the county, and not the sheriff, has control and legal authority over the purchase of necessary supplies for the county jail and courthouse, although the reasonable recommendations of the sheriff should be followed by said court or board.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of November 18, 1948, is as follows:

"I request your opinion as to the authority of the sheriff to purchase supplies for the Court house and Jail, such as soap, powder and disinfectants, there has been some question as to the sheriff's authority to do this buying."

By Title 45, Section 174, Code of Alabama 1940, the sheriff of the county is charged with keeping the county jail in a cleanly and sanitary condition and by Title 12, Section 184, Code of Alabama 1940, the sheriff has charge of the county courthouse and the keeping of it in order.

However, the county jail and the county courthouse are both county property and the court of county commissioners or the board of revenue has control of all property belonging to the county. Title 12, Sections 12(1) and 177, Code of Alabama 1940.

Our Code also provides, at Title 45, Section 184, Code of Alabama 1940, as follows:

"§184. Expense of maintenance, etc., how paid.—The expense incident to the construction, maintenance, sanitation, healthfulness and hygiene of each county jail, prison, and almshouse in this state shall be paid out of the funds of the county in which such institution is located and of the town or city, if the institution be a town or city institution."

Similarly, Title 12, Section 178, Code of Alabama 1940, reads as follows:

"§178. County buildings erected and repaired by county.—The county buildings are to be erected and kept in order and repair at the expense of the county, under the direction of the court of county commissioners, which court is authorized to make all necessary contracts for that purpose." (Emphasis supplied.)

It can thus be seen from the statutes referred to above that while the sheriff is charged by statutory law with the duty of keeping the county jail in a clean and sanitary condition and the courthouse in order, both are county property and the expenditure of funds incident to keeping said property in a clean and sanitary condition and in order is controlled by the court of county commissioners or the board of revenue of the county.

No county official has a right to bind the commissioner's court or board of revenue to the payment for supplies he has purchased without the approval of that court or board. **Escambia County v. Dixie Chemical Products Co.**, 229 Ala. 287, 156 So. 631. However, said court or board cannot arbitrarily and without just cause fail to perform its functions in making necessary arrangements for the upkeep of county property as required by law. Biennial Report of Attorney General, 1928-30, page 435. The sheriff perhaps has the best knowledge of the needs of supplies necessary to maintain the county jail and courthouse in a state of cleanliness and sanitation since he is charged with their custody, and it is my opinion that the reasonable recommendations of the sheriff in this regard should be carefully considered by the court of county commissioners or the board of revenue.

You are therefore advised that the court of county commissioners or board of revenue of the county, and not the sheriff, has control and legal authority over the purchase of necessary supplies for the county jail and courthouse although the reasonable recommendations of the sheriff should be carefully considered by said court or board.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

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